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IN THE

SUPREME COURT OF THE UNITED STATES

~~1965~~ 172

OCTOBER TERM, 1965

PAUL B. JOHNSON, GOVERNOR, JOE T. PATTERSON, ATTORNEY GENERAL, AND HEBER LADNER, SECRETARY OF STATE, OFFICERS OF THE STATE OF MISSISSIPPI,
Petitioners,

vs.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, officers of the State of Mississippi, Paul B. Johnson, Governor; Joe T. Patterson, Attorney General; and Heber Ladner, Secretary of State; pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above styled cause against them in their capacity as such officers of the State of Mississippi on March 8, 1966, rehearing having been denied on April 20, 1966.

CITATIONS OF OPINIONS BELOW

The opinion of the District Court, set forth at R. 135-164, was not reported. The entire opinion is attached as Appendix A hereto, with portions concerning Count II italicized. The opinion of the Court of Appeals is reported 357 F.2d 831. The opinion of the Court of Appeals is attached hereto as Appendix B with the portions concerning Count II italicized.

JURISDICTION

The judgment of the Court of Appeals was entered March 8, 1966. Petition for rehearing was denied April 20, 1966. Jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

I.

Does the District Court have jurisdiction to order by permanent mandatory injunction the manner in which the Governor will exercise discretion, vested in him by valid State statutes, as it was directed to do by the opinion of the Court of Appeals?

II.

Has the doctrine of exclusion, whereby a State may place conditions upon the right of a foreign corporation to do business within the State or withhold its approval entirely, been overruled or abolished or is the New York corporation, National Association for the Advancement of Colored People, vested with privileges and immunities of a citizen of the United States under the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh and Fourteenth Amendments of the Constitution of the United States are involved in this case. Sections 5310.1, 5319, 5339, 5340, and 5341, Miss. Code of 1942, Recp., are also involved and are attached as Appendix C hereto.

STATEMENT OF THE CASE

The original complaint, brought by the corporate respondent, and several individuals, was in two counts. The first count was directed against certain local officers and dealt with alleged violations of constitutional rights of individual citizens and injunctive relief was sought. No injunction was issued by the District Court against the local officers on Count I. A limited injunction was ordered to be issued on Count I by the Court of Appeals. Neither the individual plaintiffs nor the defendants to Count I have sought further review. Therefore, neither the individual citizens nor the local officials are subject to this petition, and constitutional rights of individual citizens are not at issue or involved in this phase of the case.

By Count II of the complaint, the corporate respondent sought to have the Court order Mississippi through these petitioners to approve the application of the New York corporation for domestication in Mississippi. No other relief was sought against these petitioners and no proof whatsoever was offered to show that these petitioners or anyone acting for or in concert with them did anything to deprive or seek to deprive any of the individual plaintiffs of any right whatsoever. Indeed, the exercise by the plaintiffs of their various constitutional rights, including freedom of association by membership in the corporate re-

spondent, have been freely and fully enjoyed. There is not one whit of evidence to show that any constitutional right of any individual citizen of the United States has been or will be invaded, violated or infringed upon by the failure of these petitioners to approve the application of the corporation for domestication.

The facts dealing with Count II are not in dispute. The application for domestication was filed, it was processed to the Governor, and he, in the exercise of his discretion, withheld his approval thereof entirely (R. 320). The fact that the application of the National Association for the Advancement of Colored People for domestication was handled in the same manner as all other foreign non-profit corporations (R. 345-350) is not disputed. The New York corporation was accorded due process and equal protection by such equal treatment.

The Court of first instance concluded that there was no basis for Federal jurisdiction and the District Court held that it did not have jurisdiction to order the approval of the application for domestication. The Court of Appeals ordered the District Court to order the approval of the application for domestication without giving it the benefit of informing it wherein jurisdiction to do so would lie.

REASONS FOR GRANTING THE WRIT

Introduction

The opinion and order of the Court of Appeals should be reviewed by this Court for the following reasons:

I. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision in the matter of jurisdiction of the District Court to comply with the order of the Court of Appeals.

II. The issue of the direction by a Federal court of the manner in which the Chief Executive of a state will exercise discretion vested in him by valid state statutes is of utmost importance to the maintenance of the Federal-state relationship and proper and orderly judicial process.

III. There is a direct conflict between the decision of the Court of Appeals of which review is being sought and decisions of the Supreme Court concerning the doctrine of exclusion whereby the Supreme Court has held that a state may impose conditions upon the right of a foreign corporation to do business within that state or may exclude the corporation altogether.

IV. The Court of Appeals misconceived, misapplied and misconstrued a decision of the Supreme Court in arriving at its conclusion that the District Court should grant affirmative relief to the foreign corporation against the State of Mississippi.

V. In ordering the granting of affirmative relief in favor of the foreign corporation against the State of Mississippi, the Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of the Supreme Court.

ARGUMENT

I.

The District Court Does Not Have Jurisdiction to Comply with the Order of the Court of Appeals.

The Court of first instance held that there was not any basis for Federal jurisdiction, and the opinion and order of the Court of Appeals that the relief be granted fails wholly to show wherein jurisdiction to do so would lie. The District Court is in the position as having held, as a

matter of law, that jurisdiction to grant the relief sought against these petitioners does not exist, and of having been ordered by the Court of Appeals to grant the relief. The opinion of the Court of Appeals did not give the District Court any indication of what it considered to be the basis for jurisdiction of the District Court. The jurisdictional issue was raised in the District Court (R. 81 and 82), and ruled on by that Court, Appendix A, and in the Court of Appeals (R. 1806-1809) and ruled on by that Court (R. 1826).

Jurisdiction of the Court is fundamental and ". . . a review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before us."[1]

These petitioners, the Governor, the Attorney General and the Secretary of State of the State of Mississippi, in withholding the approval of the application for domestication of respondent corporation, acted in accordance with authority vested in them as such state officials and their action therefore was state action. Section 5340, *supra*, authorizes the Governor to take the advice of the Attorney General and to approve, require amendments prior to approval, ". . . or if deemed expedient by him he may withhold his approval entirely."

The record shows without dispute that the application for domestication has, in fact, been denied and the approval of the state withheld entirely.

There cannot then be any doubt that the Court of Appeals by ordering the issuance of the permanent mandatory injunction is ordering the District Court to exercise jurisdiction over one of the United States in a suit by citizens and persons of another state.

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1. *Brown Show Company* v. *United States*, 370 U.S. 294.

Jurisdiction of the Court to grant such relief was removed by the *Eleventh Amendment* of the Constitution of the United States.

The principle of sovereign immunity has been the subject of considerable litigation in the Courts of the United States.

In *Malone* v. *Bowdoin*[2] the Court said:

> "While it is possible to differentiate many of these cases upon their individualized facts, it is fair to say that to reconcile completely all the decisions of the Court in this field prior to 1949 would be a Procrustean task.
>
> "The Court's 1949 Larson decision makes it unnecessary however, to undertake that task here."

In *Larson* v. *Domestic and Foreign Commerce Corporation*,[3] the Court announced the rules applicable to this case:

> "The question becomes difficult and the area of controversy is entered when the suit is not one for damages but for specific relief: i.e., the recovery of specific property or monies, ejectment from land, *or injunction either directing or restraining the defendant officer's action.* In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained. As indicated, this question does not arise because of any distinction between law and equity. It arises whenever suit is brought against an officer of the sovereign in which the relief sought from him is not compensation

2. *Malone* v. *Bowdoin*, 369 U.S. 642.

3. *Larson* v. *Domestic and Foreign Com. Corp.*, 337 U.S. 682.

for an alleged wrong but, rather, the prevention or discontinuance, in rem, of the wrong. *In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction.*

* * *

"In a suit against an agency of the sovereign, as in any other suit, it is therefore necessary that the plaintiff claim an invasion of his recognized legal rights. If he does not do so, the suit must fail even if he alleges that the agent acted beyond statutory authority or unconstitutionally. But, in a suit against an agency of the sovereign, it is not sufficient that he make such a claim. Since the sovereign may not be sued, it must also appear that the action to be restrained or directed is not action of the sovereign. The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. *If he is exercising such powers the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.*"

Even though the Court, in both *Malone, supra,* and *Larson, supra,* was dealing with sovereign immunity as it applies to agencies of the Federal Government, the principles announced are equally applicable to an action against state officers because such action not only involves sovereign immunity but this Court is prohibited by the *Eleventh Amendment, supra,* from exercising jurisdiction in such cases.

Since the relief ordered is a permanent mandatory injunction directed against the State, it is clear that the rules quoted above and relied upon by the District Court are opposed to granting of the relief sought.

The actions of these petitioners in this matter were acts of the State of Mississippi. These petitioners were only acting for the State in dealing with the corporate respondent. If the Court declines to review the opinion of the Court of Appeals, the District Court will be forced to act against the State. The State will be the party compelled to act as effectively as though it were a party in name as well as in fact.

The compulsion, which the Court of Appeals ordered, if imposed, will be compulsion against the sovereign, although nominally directed against the individual officers. It cannot be considered otherwise because the present Governor, against whom the compulsion is directed, has not even considered the matter.

The compulsion sought is clearly against the sovereign, which has not consented to being so compelled, and is therefore barred by the *Eleventh Amendment, supra.*

The jurisdiction of a Federal court must not be determined upon the conclusion on the merits of an action but upon a consideration of the grounds upon which the Federal jurisdiction is invoked.[4]

The fact that the Court of Appeals had jurisdiction to order limited relief against the local officials does not add to its jurisdiction to order the relief directed against these petitioners. A Federal Court is without the judicial power to entertain a cause of action not within its jurisdiction merely because that cause of action has mistakenly been

4. *Flanders* v. *Coleman*, 250 U.S. 223.

joined in the complaint with another which is within its jurisdiction.[5]

II.

A Permanent Mandatory Injunction to Affirmatively Require a Public Official to Perform an Act Is, in Effect, Equivalent to a Writ of Mandamus and Does Not Lie to Control the Manner in Which Discretion Will Be Exercised.

The approval or disapproval of applications for domestication of foreign non-profit corporations is vested by State statute in the Governor.[6] The Court will note that the statute authorizes the Governor, in the exercise of his executive discretion, to withhold his approval entirely when acting upon corporate charter applications. This is exactly what has been done in the instant case, and the exercise of that executive discretion should not be the subject of the issuance of a permanent mandatory injunction as directed by the Court of Appeals.

The issuance of a permanent mandatory injunction to affirmatively require a public official to perform an act is, in effect, equivalent to a writ of madamus, and is governed by like considerations.[7]

The State statute clearly and beyond question vests discretion in the Governor of the State of Mississippi as to whether or not he will grant an application for domestication of a foreign corporation when it provides for the granting of such an application and then provides ". . . *or if deemed expedient by him he may withhold his approval entirely.*"

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5. *Hurn* v. *Oursler*, 289 U.S. 238.
6. See Appendix C.
7. *Miguel* v. *McCarl*, 291 U.S. 442.

The remedy of mandamus is, in the main, restricted to situations where ministerial duties of a non-discretionary nature are involved, as where the matter is peradventure clear, or an administrative agency is clearly derelict in failing to act, or the action or inaction turns on a mistake of law.[8]

As heretofore shown, the act performed by the former Governor of Mississippi in rejecting the application of corporate appellant was clearly the exercise by him of discretion vested in him by the statutes and laws of the State, which said laws shall be regarded as rules of decision by this Court.[9]

Where an officer is given discretion, mandamus and permanent mandatory injunction being comparable and governed by like consideration, neither will issue to control a public officer in discharging an official duty which requires the exercise by him of judgment and discretion.[10]

Among the concerns which have traditionally counseled a federal court to abstain from blocking the exercise by state officials of their appropriate functions are the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions.[11]

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8. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309.

9. 28 *U.S.C.* 1652.

10. *Work* v. *United States ex rel. Rives*, 267 U.S. 175; *United States ex rel. Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316; *Marbury* v. *Madison*, 1 Cranch 137.

11. *Martin* v. *Creasy*, 360 U.S. 219.

III.

The Doctrine of Exclusion, Whereby a State Is Authorized to Impose Conditions upon the Right of Foreign Corporations to Do Business Within the State or to Exclude Them Altogether, Is a Valid Subsisting Doctrine of the Supreme Court and the Opinion of the Court of Appeals and Order Directed Thereby Is in Conflict Therewith.

One of the fundamental legal differences between a natural-born citizen and a corporation in the jurisprudence of this nation is that a natural-born citizen can move freely from state to state, whereas a corporation, being a creature of the state of its creation, moves from that state to all other states by the grace and permission of the state into which it seeks to move. The two exceptions to that distinction are: (1) that corporations engaged in interstate commerce may not be restricted to the state of their creation;[12] and (2) the right of exclusion may not be exercised so as to deprive the corporation of any constitutional right which it, the corporation, may have as distinguished from the constitutional rights of the shareholders or members of the corporation.[13]

The burden of proof was on the corporation to show that it, as a corporate entity as distinguished from its members, was entitled to the relief sought in this case both as a matter of fact and as a matter of law.[14]

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12. Art. I, Sec. 8, Cl. 3, *U. S. Constitution.*

13. *Terral* v. *Burke Construction Co.*, 257 U.S. 529.

14. The United States Supreme Court held in *New Orleans & Northeastern R. Co.* v. *Harris*, 247 U.S. 369: "The burden of proof is on the plaintiff in making out its cause of action, and this burden of proof must be satisfied in order to sustain the decision or finding in favor of the party on whom the burden rests." 31A *C.J.S.* 164, *et seq.*, Evidence, §103, *et seq.*

Asbury Hospital v. *Cass County*, 326 U.S. 207, p. 211, held:

> "The Fourteenth Amendment does not deny to the State power to exclude a foreign corporation from doing business or acquiring or holding property within it." (Cases cited.)

The testimony that foreign non-profit corporations have been treated alike in all respects by the office of the Attorney General is not disputed by any evidence offered on behalf of the corporation. In fact, the total dearth of evidence on behalf of the corporation really presents a question of law for determination because the facts developed show only that the application for domestication was filed and that it was subsequently denied.

The order of the Court of Appeals is in direct conflict with the doctrine of exclusion for the reason that by it the District Court is required to order officers of the State of Mississippi to admit the New York corporation to engage in intrastate business in Mississippi on a mere showing that an application to so engage in business was made and that the application was denied.

Failure of this Court to review the opinion of the Court of Appeals will have the effect of abolishing the doctrine of exclusion in this case. The abolition will come, not by the Court wherein the doctrine originated, was respected for years and relied upon by the several states, but by a Court of Appeals. A shadow will be cast upon the very existence of the doctrine until such time as this Court shall remove the doubt.

IV.

The Court of Appeals Misconceived, Misapplied and Misconstrued a Decision of the Supreme Court in Arriving at Its Conclusion That the District Court Order Affirmative Relief to the Foreign Corporation Against the State of Mississippi.

The doctrine of exclusion was recognized in the case relied upon by the Court of Appeals as its sole authority for directing that the order of approval of the application

for domestication be entered.[15] This Court passed the doctrine of exclusion in that case by stating:

> "There is no occasion in this case for us to consider how much survives of the principle that a State can impose such conditions as it chooses on the right of a foreign corporation to do business within the State, or can exclude it from the State altogether."[16]

and held that that case involved freedom of individuals to associate instead of the right of a corporation to do business. As between these petitioners and the respondent there is no other issue except the privilege of a corporation to do business in Mississippi. The freedom of individuals to associate is not in issue in this phase of the case.[17]

The issue in *N.A.A.C.P.* v. *Alabama*[18] was the right of a state to enjoin the association of the members of the corporation with the corporation. The issue in this case is the right of that corporation to force itself upon the state when no attempt has been made to interfere with its activities or the rights of its members.

N.A.A.C.P. v. *Alabama*[19] does not support the conclusion reached by the Court of Appeals for the reasons that: (1) jurisdiction of the Court to enter the order that it did was waived by Alabama having brought the suit; (2) granting the right to foreign corporations to do business in Alabama is, by virtue of Alabama statutes, a ministerial function on the part of the Secretary of State; and (3) the order directed to be entered in that case was the

15. *N.A.A.C.P.* v. *Alabama*, 377 U.S. 288.
16. *Crescent Cotton Oil Co.* v. *Mississippi*, 257 U.S. 129.
17. *Hurn* v. *Oursler*, *supra*.
18. *N.A.A.C.P.* v. *Alabama*, 377 U.S. 288.
19. *Ibid.*

result of the case having been brought before the Supreme Court four different times and could be considered in the nature of the Court's version of justice to a vanquished foe in order to finally dispose of the matter.

The relief ordered to be granted in that case was a result of militant aggressiveness on the part of the State of Alabama. In the case at bar, the only militancy shown is the testimony of the State Attorney General that he does not agree with the corporation's approach to problems and for that reason does not believe that the State should place its stamp of approval on the corporation. No militancy whatsoever has been shown by the record toward the individual members of the corporation by any of these petitioners.

The Court of Appeals found: (1) That the Secretary of State notified the corporation that it was required to domesticate; (2) That the legal reasons shown by the record to have been given by the Attorney General and his assistant were not sufficient to warrant a denial of the application for domestication; and *a gratia* (3) the Governor, who gave no reason for the exercise of his executive discretion in withholding his approval entirely, must with the other officials approve the application. The Court of Appeals then ordered the District Court to issue a mandatory injunction whereby these petitioners are ". . . required to approve the application for domestication of the NAACP and to take all necessary and proper steps to entitle it to do business in the State of Mississippi."

The Court of Appeals states:

"Prior to 1963 it (corporate appellant) carried on these activities in the State of Mississippi through unincorporated affiliates, although it maintained its own offices in the state; while in 1962 it received

notice from the Secretary of State that the Mississippi Code had been amended, effective January 1, 1963, to require foreign non-profit corporations to domesticate in order to do business in the State."

That finding of the Court of Appeals cannot be based upon any fact developed in the record for the reason that the record fails wholly to reflect that any such notice was given to the corporation, or anyone for that corporation, by the Secretary of State. Indeed, the complaint does not even allege that such notice was given.

Appellate courts cannot make a factual determination which may be decisive of vital rights where crucial facts have not been developed.[20]

Sec. 5319, Miss. Code of 1942, Recp., as amended in 1962, effective January 1, 1963, was a part of the enactment of the Mississippi Business Corporation Act."[21]

This Court should not enjoin the enforcement of any part of that statute because no proper basis for declaring the statute invalid as provided by law has been followed.[22] The State has not sought to enforce its provisions against the corporation. The petitioner Attorney General has not attempted to enjoin the activities of the corporation or any of its members.[23] The record is clear that the activities of the corporation and its members go on unabated.

It is emphasized at this point that no showing whatsoever is made in this record of any attempt on the part of any of these petitioners to deprive any of the individual

20. *Price v. Johnson*, 334 U.S. 266.

21. See Appendix C.

22. 28 *USCA* 2281, et seq.

23. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449; *Bates* v. *City of Little Rock*, 361 U.S. 516; *Louisiana, ex rel., Jack Gremillion* v. *N.A.A.C.P., et al.*, 366 U.S. 293.

members of the corporation of their right to free speech, assembly, protest and peaceful picketing or indeed to deprive them of their right to membership in the corporation. The rights of individual citizens of the United States to enjoy privileges and immunities guaranteed to them by the *Fourteenth Amendment* are not involved in this petition for certiorari. No such deprivation of constitutional rights or attempt at such deprivation is shown by the record to exist insofar as these petitioners and Count II of the original complaint are concerned. The language of the Attorney General quoted by the Court of Appeals of differences between the corporation and its approach to problems and his own is not entitled to be compared with the allegations for injunction as was done by the Court of Appeals to substantiate its application of *NAACP* v. *Alabama*[24] to the case at bar.

V.

Corporations Are Not Citizens Entitled to Privileges and Immunities but Are Persons Entitled to Due Process and Equal Protection.

There is a total absence of proof that the denial of the application of the foreign non-profit corporation to become domesticated in Mississippi effects or affects the constitutional rights of any individual members thereof or of any citizen of the United States. As heretofore observed, the only issue presently pending is the right of a foreign non-profit corporation through the good offices of the Court to force itself upon the State of Mississippi.

The question then is not whether any constitutional right of any individual citizen has been violated but whether the corporate respondent is vested with a con-

24. 377 U.S. 288.

stitutional or statutory right to do business in the State of Mississippi and the propriety of the issuance of the permanent mandatory injunction to accomplish that result.

The *Fourteenth Amendment* has never been construed to vest "privileges and immunities" in corporations. "Privileges and immunities" protected by that constitutional amendment are limited to ". . . citizens of the United States. . . ." The very nature of the "privileges and immunities" protected by the amendment are such that artificial legal entities, *i.e.*, corporations, are incapable of exercising or enjoying them. The "privileges and immunities" of citizenship can only be enjoyed by citizens. Corporations are not and cannot be made citizens capable of exercising "privileges and immunities" of citizenship.

That a corporation is not a citizen entitled to privileges and immunities has been consistently upheld by the United States Supreme Court.

> "A corporation is not a citizen, within the meaning of the constitutional provision, and hence has not the privileges and immunities secured to citizens against state legislation. *Orient Ins. Co.* v. *Daggs,* 19 S. Ct. 281, 282, 172 U.S. 557, 43 L. Ed. 552, citing *Paul* v. *State of Virginia,* 75 U.S. (8 Wall.) 168, 19 L. Ed. 357."
>
> (Citing numerous cases.)
>
> "A corporation is not a 'citizen', within U.S.C.A. Const. Amend. 14, as to the abridgment of privileges and immunities of citizens, . . ."[25]

25. *Words and Phrases, Permanent Edition,* Volume 7, page 261.

It is established that a corporation cannot affirmatively assert for others rights which it itself does not have or enjoy.[26]

It is as equally well settled that corporations are persons within the Federal and State Constitutions guaranteeing to all persons due process and equal protection of law,[27] as it is that corporations are not citizens possessing "privileges and immunities" as such.

The record clearly reflects in this case that the corporate respondent has been treated equally and in the same manner as all other foreign non-profit corporations similarly situated and that due process and equal protection of the law has therefore been satisfied.

The order of the Court of Appeals is in direct conflict with the authorities cited above and the principle of distinction between corporations and natural persons heretofore established, recognized and repeatedly approved by this Court. It is apparent that the Court of Appeals overlooked the distinction in rendering its opinion and order. The distinction was established by this Court as a matter of Federal constitutional law and since the opinion of the Court of Appeals is in conflict therewith, we submit that ground alone is sufficient to justify this Court to review the opinion by certiorari.

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26. *Hague* v. *Committee for Industrial Organizations*, 307 U.S. 496.

27. *Words and Phrases, Permanent Edition*, Volume 32, page 351.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the writ of certiorari should be issued.

Respectfully submitted,

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By .....

PROOF OF SERVICE

The undersigned, Attorney of Record for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of May, 1966, I served copies of the foregoing petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, by depositing same in a United States Post Office, with sufficient first class postage prepaid, addressed to:

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115½ North Farish Street
Jackson, Mississippi

Carsie A. Hall, Esquire
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APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL Plaintiffs, v. ALLEN THOMPSON, Mayor of the City of Jackson, Mississippi, ET AL Defendants.	Civil Action 3432

Opinion

The corporate plaintiff and certain white and negro individuals seek a permanent injunction against the officials of the City of Jackson, the city and county prosecuting attorneys, the Commissioner of the State Highway Patrol, the Sheriff of Hinds County, the Governor of the State of Mississippi, the Attorney General of Mississippi, and the Secretary of State of Mississippi, to enjoin interference with certain alleged Civil Rights of the plaintiffs. *The complaint is in two counts.* Count 1 is essentially a claim for injunction against the municipal authorities to enjoin them from interfering with the right of the plaintiffs to "demonstrate" without a permit, engage in peaceful picketing, be exempt from prosecution for breach of peace, and trespass, and to be at liberty to engage in prayer service on the steps of public buildings during peak business hours. The plaintiffs complain that private business establishments on Capitol Street, which is the busiest and most concentrated business area in the municipality, from

Mill Street to State Street, a distance of ten or twelve blocks, discriminates against negroes. The restaurants will not seat and serve negroes in the establishments. The stores do not allow them to drink out of the same fountain used by white patrons. The help in the stores do not confer courtesy titles on negroes and do not show them the desired respect. The complaint contends that this treatment is all a part of a hard core policy of segregation in Mississippi and that it is probably inspired and enforced with public power and might. The plaintiffs complain of unfair treatment and handling of their views and grievances by the news media. They contend that they are thus obliged to resort to the measures which they have adopted as a means of expression to the public of their dissatisfaction with such treatment, and that their right to such expression in such manner is protected by the First and Fourteenth Amendment to the Constitution of the United States. Accordingly, plaintiffs say that they are being persecuted in the interest of a segregation policy when they are arrested and prosecuted for violating certain peace laws and traffic regulations.

Count 2 of the complaint is basically a claim against the Governor, State Attorney General and Secretary of State to compel those authorities to approve the application of the corporate plaintiff, as a non-stock, non-profit corporation chartered under the laws of New York, to qualify to engage in business in Mississippi. Those state officials are vested by the state with the administration of the laws of the State of Mississippi governing domestic and foreign corporations qualified to do business within the state. Those officials rejected such application of said foreign corporation to do business in this state, although it has admittedly done business in Mississippi for many years.

The defendants in the first count of the complaint, say that the individual plaintiffs and others were arrested on several occasions in May and June 1963 during an incitement drive inaugurated and sponsored by and under the direction of the NAACP, known as the Jackson Movement, when the plaintiffs and others violated valid ordinances of the municipality against parading without a permit and blocking the sidewalks and streets against their intended purpose and use in furtherance of an unlawful purpose. The municipality denies that it has any ordinance or policy or practice in furtherance of any segregation policy of any private business establishment on Capitol Street. The city does not deny or question the right of any individual in the exercise of free speech, but contends that the paramount public interest requires a regulation of peaceful picketing and demonstrating within a legitimate and proper sphere.

As to the second count, the defendants contend that the charter of the corporate plaintiff does not comply with important requirements of the laws of Mississippi regulating the incorporation of non-stock, non-profit corporations; that they have not discriminated against this corporation in denying it authority to do business in Mississippi, but that they have denied such authority in like manner to other foreign corporations from different states. The defendants further say that this claim in this count is effectually a suit against the State of Mississippi against its wishes in violation of the Eleventh Amendment to the Constitution of the United States.

The Chancery Court of Hinds County, Mississippi, enjoined all of the plaintiffs and others from parading in the city of Jackson without a permit, from demonstrating in large numbers on the sidewalks and in the streets of the municipality, and from engaging in a conspiracy among

themselves to boycott and injure the businesses of the merchants on Capitol Street by picketing those businesses, and by resorting to force and violence against negroes who continued to patronize such merchants in defiance of the Jackson Movement.

This Court declined to grant the plaintiffs a temporary restraining order, and that order was approved by the United States Court of Appeals for this Circuit in 321 F.2d 199. Later, on January 10, 1964, this Court declined to grant a temporary injunction herein. *This case has now been heard by the Court on its merits, and after hearing all of the testimony adduced by the parties and receiving and considering all of the evidence of both parties, the Court was furnished with able briefs by counsel for the parties, and after hearing oral arguments of counsel, the Court examined all of their authorities and presently makes its finding of facts and conclusions of law thereon.*

FINDING OF FACTS

The City of Jackson has no ordinance against integration or in favor of segregation on its minutes. The State of Mississippi has no statute on its books requiring any kind of segregation of the races in private business establishments. The plaintiffs and others for such offenses committed in May and June 1963 were arrested and prosecuted in the city court for violation of municipal ordinances, against parading without a permit, blocking the sidewalks and streets and breach of the peace statute and trespass statute.

The Mayor of Jackson is the commissioner of police in Jackson. He is personally a dedicated segregationist and stated in court that he believed very deeply and sincerely that a separation of the races was absolutely necessary for the best interest of both the negro and white

races. But neither the Mayor nor anyone in authority with the municipality ever promulgated any rule, regulation, instruction or directive (openly or secretly) to the police officers to govern or control them in their arrests or charges on any race question involving segregation. The City of Jackson has no official policy or pattern of practice governing the official conduct of the policemen on any aspect of segregation.

The Mayor has stated publicly on the radio, on television and in the courts, that the City of Jackson was not and is not interested in any policy or any practice of any private business in Jackson as to whether or not they will hire or serve one race or another or both races; and he stated very emphatically that the City of Jackson would protect any business upon request in carrying out the policy voluntarily made by any business under its own decision and initiative. In furtherance of that policy, the police would not enter the Woolworth's Store on Capitol Street when a fight erupted between some Tougaloo students and some bystanders in the store because the management never invited the police into the store to intercede. They were acting under such orders in not participating in this disturbance on private property inside this business establishment. The president of this negro college was present on this occasion and upon seeing the violence erupt, he was unsuccessful in getting the store manager to invite the policemen from the street in front of the store into the store for assistance until the manager contacted his New York office for instructions. This difficulty arose when a negro student at Tougaloo took a seat at a lunch counter in the store designated for white patrons. He was assaulted by a white citizen. Both of them were arrested and carried to police headquarters. The charge against the negro was dropped and he was

discharged. The white man was tried and convicted and punished for his act. No agent of the State of Mississippi or agent of any subdivision thereof (particularly, the City of Jackson) has been shown by the evidence in this case to have done any act which violated any Civil Right of any plaintiff, or which denied to any plaintiff, or unlawfully abridged or curtailed, any constitutional right (particularly, any First or Fourteenth Amendment right) of any plaintiff in this case.

Section 2056(7) and Section 4065.3, Mississippi Code 1942, established or undertook to establish a policy of segregation of the races on public premises (such as schools, parks, waiting rooms, amusement, recreation and assembly as specifically enumerated) but does not undertake to establish any state policy with respect to privately owned and operated businesses such as are involved in this case. Such statutes have no application to or effect on any private owner of the businesses or the arrests or charges resulting from the incidents in suit.

Primos Restaurant on Capitol Street is a very popular restaurant for white patrons only. Some negresses sought and were denied service and were told to leave the premises, but refused to do so. The management made his decision uninfluenced by any kind of state or municipal policy, but solely for his own personal best interest in the conduct of such private business. No statute in Mississippi or ordinance or influence of any public official had any part in influencing such decisions; and there is no statute or ordinance in Jackson, Mississippi, which would deny such institutions the right to serve negro and/or white customers if they wished to do so. The trespass statutes in Mississippi are no part of any scheme or plan affecting segregation or to enforce segregation. The own-

ers and operators of such private establishments refused to serve some negroes who entered for service in the restaurant, and the YMCA refused to allow some young negroes (without membership or invitation as required), to enjoy its services and facilities, and were told by such management to leave the premises and they refused to do so, whereupon the management of such establishments expressly requested the police to arrest and remove said persons from their premises. Those negroes were thereupon arrested and charged with trespassing on said occasions. No state action or actions of the state in furtherance of any state policy of segregation was in anywise or to any extent involved in those incidents. Those private establishments had the privately owned property right to serve, or receive those negroes on such occasions, or not as they chose; and when they voluntarily elected not to serve, or allow those negroes to enjoy their facilities on their privately owned and operated premises, they properly called the police to eject said persons as trespassers. No right of these negroes under said circumstances transcends the paramount right of Primos Restaurant and the YMCA to dictate as to whom it will serve and allow to enjoy the use of its privately owned premises. That is one of the fundamental elements of value presently enjoyed as a matter of vested right in privately owned property.

The negroes in this community have a meeting hall, or large auditorium on Lynch Street in Jackson where they meet for pep talks prior to their public demonstrations. These pep talks were characterized as militant. The police in the audience described them as inflammatory in nature. There were several of these demonstrations which followed a common pattern and a description of one of them will suffice. Several hundred negroes

(mostly young people and some children) left the Masonic Temple on Lynch Street and proceeded east on Lynch Street under the leadership of some white professors at Tougaloo college. This group filled the street and blocked traffic for some distance near its intersection with Poindexter Street where they were stopped by the police and told to disperse. The orders of the police to disperse and desist from blocking traffic were ignored and the police were heckled and shown much disrespect for their authority. It is sufficient to say that these so-called mass street demonstrations were nothing short of public nuisances and caused traffic to be disrupted and diverted in the area and caused much confusion on account of such improper and unauthorized use both of the sidewalk and the street in the area. Nobody had a permit to parade on these occasions. Nobody sought a permit, and doubtless a permit would have been refused for any such disorderly and irresponsible horde of people filling the thoroughfares in a deliberate effort to do exactly what they did as a means of protesting their racial status. A large number of these negroes were arrested and charged with parading without a permit.

Several college age negroes and a white professor from nearby Tougaloo college demonstrated by marching in a large circle on the steps of the postoffice building in Jackson during peak business hours, and attracted quite a large crowd inside and outside the building in resentment of their improper use in blocking the main entrance to this public building. The police moved in on the group, and ordered them to disperse whereupon they pretended to engage in a prayer service while ignoring the orders of the police, and the white minister laid down and had to be dragged to the paddy wagon when he was arrested. It is that incident which the plaintiffs choose to

characterize as a prayer service which they were denied the right to continue in such manner under such circumstances at that place.

Another incident in suit is the "demonstration" or riot following the Evers funeral. This negro integration leader was assassinated in Jackson, resulting in a very tense racial situation in this community for some time. The City of Jackson granted a permit on this occasion for several thousand negroes to follow a funeral procession for several miles under constant police escort from a point on Lynch Street to the funeral home on Farish Street without incident. As the procession wound up at its destination, however, one of the named plaintiffs, who is an official of the corporate plaintiff, commenced a militant drive toward the city hall across the business section of the city. The tension and excitement of the moment were too much for most of this large crowd of several hundred negroes and some white people who turned away from the funeral home, and proceeded on their march in the opposite direction in the street and on the sidewalk on Farish Street near the busiest area of this largest city in the state. The police promptly ordered this mob to halt and disperse, but most of them refused to do so and were arrested and prosecuted. The police were stoned and cursed and vilified on this occasion. Some fourteen police were injured in this event. An attorney of the Justice Department was present and he sought to intercede and barely escaped serious injury himself at the hands of this unruly mob. This NAACP official boldly refused to halt his march at the orders of the police, but instructed his followers to go forward through the police line whereupon he was subdued by the police with necessary physical force. No excessive force was applied to this individual on this occasion.

These incidents resulted in such wholesale arrest of such large numbers of negroes that temporary facilities for their detention had to be constructed on the fairgrounds. The city did not have sufficient paddywagons to accommodate the prisoners, and used a new garbage truck on one occasion to supplement those facilities. These prisoners were not unduly manhandled, or mistreated by their captors on these occasions, although some of the negro girls said that the garbage trucks in which they were hauled were dirty. The evidence on this point is not clear or convincing, but the Court is convinced that none of these negroes were subjected to any so-called brutality, or subjected to any unnecessary force. The temporary jail facilities were neat and clean and sanitary and the food was good as an inspection in the presence of the Justice Department and some of plaintiffs' attorneys in this case disclosed.

The burden of proof is on the plaintiffs to show by a preponderance of the evidence the necessity for an injunction and their right to such extraordinary process in this case. Although the Court is acutely mindful of the delicate balance between the constitutional rights of these plaintiffs, and the power and authority of this municipality to regulate and control them in the public interest in the exercise of such right to a limited degree, these plaintiffs simply have not shown this Court by the greater weight of the more convincing evidence that they have any claim against either of the defendants upon which relief can be granted. It cannot be doubted from the clear evidence in this case that these plaintiffs were engaged in an unlawful secondary boycott of the Capitol Street stores in Jackson, and that their effort to picket those stores was neither peaceful nor legal. Their purpose in forming such a conspiracy against those merchants was inherently illegal, although any colored citizen as an individual had a clear

right to withhold patronage from any merchant whom he did not wish to patronize, with or without reason therefor; but these negroes wrongfully and unlawfully banded together in the Jackson Movement to boycott these stores and they had no right to picket in furtherance thereof. These pickets carrying signs constituted a public nuisance on the sidewalk in front of these stores in the busiest section of the business district during peak hours and they were properly arrested and prosecuted.

Discrimination or any policy or any practice of segregation in any strictly public place supported, owned or operated at public expense is not involved in this case. It is vaguely mentioned in an ambiguous way in the complaint and in three pieces of evidence relating to public parks; but there is no substantial proof in support thereof in this record. That charge is thus not involved in this proceeding probably because of an injunction from this Court which is presently extant on that subject.

There is no evidence before the Court in this record to show that any policies, or practices of private business establishments on Capitol Street, which were displeasing to plaintiffs, were motivated, or influenced in any manner, or to any extent by any of the defendants. The ordinances and laws under which the plaintiffs were arrested and are being prosecuted were not designed or intended to prevent, abridge or curtail any constitutional right of any citizen regardless of his race or color. These ordinances and laws under which the plaintiffs were arrested on the occasions in suit were designed and intended merely to regulate and control the proper use of the sidewalks and streets of the municipality for the public use generally, and in the public interest. Most of the arrests in suit were for parading without a permit in violation of a city ordinance. Such an

ordinance has a good purpose and a reasonable relation to the proper administration of municipal business. While a permit to parade was granted for the Medgar Evers funeral procession involving several thousand negro citizens, a permit to parade was denied by the city to the white Shriners of Mississippi near the same dates. The Court does not think that Will Palmer should have been charged with parading without a permit, but the facts were not sufficiently developed by either side before the Court to show the circumstances of his arrest. It is my understanding that he entered a plea of nolo contendere in the city court and that his case is on appeal in the county court at Jackson. It must be presumed that he will receive a fair trial in that honorable court. The same observation is made with respect to a small group of T-shirted young negroes who were walking up and down Capitol Street without signs or placards. There is nothing in this record with respect to those individuals which indicates the necessity for any intercession by this Court.

The corporate plaintiff has not shown by a preponderance of the evidence that its application to do business in Mississippi was arbitrarily and capriciously denied. The Governor of the State refused to sign the permit authorizing this New York corporation to engage in business in Mississippi because the Attorney General of Mississippi advised him that the corporation did not meet the statutory requirements therefor; and that it was not in the best interest of the State of Mississippi to authorize such corporation to engage in its intrastate business within Mississippi. No fact or circumstance is shown by the evidence to support any claim of this foreign corporation to a vested right to do business within Mississippi, and it is not shown factually that any constitutional right of this New York corporation is violated by such refusal. The suit is in this

respect essentially a suit against the State of Mississippi, which though not a party to the suit in name is a party in effect, against its wishes and in violation of the Eleventh Amendment of the Constitution of the United States.

CONCLUSIONS OF LAW

The NAACP, a New York corporation, seeks to sue in the first count of the complaint for the use of its members. The defendants resist that procedure on the ground that constitutional rights may be asserted only by the person entitled thereto and not by one for another. The NAACP relies for its authority upon NAACP v. Alabama, 357 U.S. 449. That was a proceeding by a state to compel the NAACP to disclose its membership list. The corporation advanced the interest of its members in secrecy of association as a defense and was sustained by the Court in that position. That decision is a far cry from the right of the corporation to file a suit, as here asserted, to have adjudicated certain affirmative constitutional rights of its members. That simply may not be done. Hague, Mayor, et al. v. CIO, 307 U.S. 496. That is the unmistakable mandate of Civil Rule 17(a) and is controlling on the point here.

The right of free speech, assembly, worship, protest, peaceful picketing, and any other right conferred by the Federal Constitution is not in issue, and is not disputed, or questioned here. The activities of the plaintiffs for which approval here is sought is the unbridled exercise of such rights in violation of valid regulations designed and intended to protect the rights of the public generally who have the same rights as the plaintiffs. These laws applied to these people are enforced fairly and impartially and without discrimination, and have no relation or regard to race or color. The laws and ordinances under which

plaintiffs were arrested and charged do not abridge or curtail any constitutional right of any plaintiff. The ordinances do not outlaw parading, except without a permit, at times, and in places, and in a manner which can be properly supervised and protected as was the Evers procession. The picketing was by individuals, not employees, against hiring practices of private establishments and for other policies and practices of such privately owned and operated business establishments. Such picketing was in each instance conducted at peak business hours and unreasonably interfered with the use of the sidewalk by the public. This picketing was in furtherance of a conspiracy initiated and promoted by the plaintiff corporation and participated in by all of the plaintiffs as the Jackson Movement. Such picketing was thus neither peaceful nor legal. It was properly stopped by the police. The plaintiffs are not entitled to a declaration of rights, but the Court finds no difficulty in denying relief for the activities engaged in in this case, if found to be guilty thereof on a fair trial in the state courts.

The Primos Restaurant, and the YMCA in Jackson are privately owned and operated private institutions not in anywise supported by public money and not on public property. For its own business reasons and acting voluntarily without any outside public influence from any public source, Primos Restaurant does not seat and serve negro customers, and the YMCA on North State Street does not open its facilities to negroes, but only to its white membership.

There is no doubt of the fact that these negro plaintiffs have an absolute right equal to that of any white person to use and enjoy the public parks, and there is no substantial amount of convincing evidence in this record that any need exists for an injunction to protect or en-

force such undisputed right which has been previously decreed by this Court. *Nobody questions plaintiffs' undoubted rights to free speech, assembly, protest and peaceful picketing.* Those are well grounded personal rights of the individual which cannot be gainsaid. Here we are concerned with the circumstances and conditions under which these rights are asserted by the plaintiffs. We are not concerned with the question of the validity of the state laws and ordinances under which plaintiffs were arrested and are being prosecuted. Neither are we concerned whether or not the plaintiffs are guilty or not guilty of such charges. The important question is as to whether or not plaintiffs' constitutional rights are being denied by these prosecutions under the circumstances in furtherance of an unlawful policy of segregation, or is there in truth and in fact some substantial valid basis in law for the application and enforcement of the ordinances and laws in question as against these plaintiffs.

Constitutional rights must be asserted and enjoyed within the range of valid regulatory statutes enacted in the public interest for the preservation and protection of the rights of the public. No person has any civil right to trespass on the private property of another no matter what his purpose may be in doing so. Free speech does not entitle one to holler fire in a crowded theater, nor may any horde of discontented citizens take over the sidewalks and streets of a municipality as a means and for the purpose of protesting something to their dislike. Traffic may not be blocked and caused to be diverted by hundreds of people marching in the streets, no matter what purpose they may have had in mind in doing so. It cannot be said that a public sidewalk or an entrance to a public building is a proper promontory for a prayer service regardless of its intended advertising value. Municipalities have the right and even

the duty to the public to prevent any such improper use of thoroughfares. A valid and wholesome purpose can afford no excuse or justification for the violation of a valid enactment. Incitement to disrespect of law is not a hallmark of good citizenship or good manners. None of the plaintiffs were employees of the establishments being picketed. Those establishments had the right to hire anybody they pleased. The individuals who were displeased by the hiring practices of such establishments had the undoubted right to withhold their patronage and express their displeasure thereat, but they had no right to enter into any conspiracy as they did in the form of the "Jackson Movement" to boycott these Capitol Street stores and picket in furtherance thereof. These pickets unreasonably interfered with the normal flow of pedestrian traffic in the number one business block of Jackson during peak business hours and were thus not engaged in peaceful picketing as contended. Such picketing was neither peaceful nor for a lawful purpose, and the offending parties were properly arrested and prosecuted.

The several street demonstrations may be best characterized as mass disorders which invariably got out of hand, and erupted once into a riot of unruly and defiant people under irresponsible leadership. A group at a school in Jackson during a disturbance actually captured one of the peace officers and dragged him into a building and held him for a time. He was later freed by the officers with an injured finger. The throng of colored people and some white leaders on North Farish Street immediately following the arrival of the Evers procession at the funeral home was led by an official of the NAACP. He resisted arrest and was subdued with necessary physical force and claims that the police were brutal. The facts show that the peace officers exercised commendable restraint in handling this

difficult and dangerous situation which was created by the plaintiffs in this case. It can hardly be said that these plaintiffs under such circumstances are in this Court with clean hands asking the aid and assistance of a Court of conscience.

This case simply does not present such intolerable abuses of plaintiffs' Civil Rights which are supposed by counsel to exist, and about which sound authority is cited, but the facts and circumstances in this case are vastly different and have no similarity to those in the cited cases. It is my view that the officers should not have arrested or charged some of those charged with parading without a permit, but the need for injunction to rectify such wrong is neither urgent nor apparent.

The plaintiffs disapproved of certain policies of Capitol Street merchants. They thereupon formed the Jackson Movement and actively engaged in a secondary boycott of these businesses. All activities in furtherance of such boycott were illegal. 15 C.J.S. (Conspiracy) Sec. 12(b), pages 1013-1014. The defendants contend with great persuasion that plaintiffs' "Jackson Movement" was a conspiracy condemned by Sec. 1088(a), Sec. 1088(b) and Sec. 1089(a) and Sec. 1089(b), Mississippi Code 1942, and that such Jackson Movement was likewise illegal as a boycott of Capitol Street businesses and designed and intended only to injure said businesses, (Cf: *Wesley* v. *Native Lumber Company*, 53 So. (Miss.) 346); hence such activities being illegal, that all picketing in furtherance thereof was not peaceful or legal. With that contention, the Court agrees. None of the pickets were employees or former employees of the businesses being picketed. They were simply outsiders and even nonresidents who conspired together to try to dictate the hiring and business policies of those businesses. Undoubtedly, the plaintiffs have no constitutional immunity

from arrest and prosecution while engaged in non-peaceful picketing for an illegal purpose. *Hughes* v. *Superior Court of California,* 399 U.S. 460. The YMCA as a private institution had a right to exclude nonmembers. It had the right to receive or not receive negro visitors on the premises who went there for the sole purpose of testing the laws. Likewise, Primos Restaurant had the right to seat and serve or not, the negresses who appeared and requested service for the purpose of testing the trespass statutes. Those private businesses voluntarily decided not to serve those people presumably for the sole reason that they were negroes and they had the right inherent in their ownership of their property to do exactly that. Such right of the owner of a private business is one of his most valuable attributes of ownership. *Civil Rights Cases,* 109 U.S. 3; *Shelley* v. *Kraemer,* 334 U.S. 1; *Burton* v. *Wilmington,* 365 U.S. 715; *Lombard* v. *State of Louisiana,* 373 U.S. 267; *Williams* v. *Howard Johnson,* (4 C.A.) 268 F.2d 845. He may contract with whom he pleases. It is a matter of great public concern that freedom of contract be not lightly interfered with. *Palmer* v. *Chamberlin,* (5 C.A.) 191 F.2d 532. Likewise, this Circuit has said that a person may hire or contract with whom he chooses. *Van Zandt* v. *McKee,* (5 C.A.) 202 F.2d 490. The trespass statute under which these negroes were charged and are being prosecuted is not part of any scheme or plan or policy of segregation. That statute has been in effect in Mississippi long prior to any controversy between the races. The facts and circumstances in this case conclusively show that no state action or action of the state is involved in these proceedings within the meaning of that phrase in these cases. The ordinance of the City of Jackson against parading without a permit is a valid traffic regulation which does not unduly abridge any paramount constitutional right of any plaintiff. *Hague, Mayor,* v. *CIO,* 307 U.S. 496; *Snyder* v. *Irvington,* 308 U.S. 147; *Cox* v. *New Hampshire,* 312 U.S. 569; *Poulos* v. *New Hampshire,* 345 U.S. 395.

A citizen is not immune from prosecution in good faith for his alleged criminal acts even under an unconstitutional statute. *Trent* v. *Hunt*, 39 F. Supp. 373, affirmed 62 S. Ct. 115; *Watson* v. *Buck*, 61 S. Ct. 962; *Beal* v. *Missouri-Pacific Railroad*, 61 S. Ct. 418; *Stefanelli* v. *Minyard*, 72 S. Ct. 118; *Douglas* v. *City of Jeannette*, 63 S. Ct. 877; *City of Miami* v. *Sutton*, (5 C.A.) 181 F.2d 644; *Wojcik* v. *Burton Palmer, et al.*, (7 C.A.) 318 F.2d 171; *Bailey* v. *Patterson*, 368 U.S. 346. In the recent case of *Cleary* v. *Bolger*, 371 U.S. 392, 83 S. Ct. 385, the Court said: "Courts of equity traditionally have refused, except in rare instances, to enjoin criminal prosecutions. * * * It has been manifested in numerous decisions of this Court involving a state's enforcement of its criminal laws."

The contention and argument of the plaintiffs regarding their conclusions as to the segregation policy of Mississippi was rejected by this Circuit in a habeas corpus case wherein the writ was sought, on the theory asserted here, that a fair trial is not available in the state courts because of such deeply ingrained policy. Those conclusionary contentions were asserted and rejected in *James Brown* v. *W. B. Rayfield, Chief of Police*, (5 C.A.) 320 F.2d 96. It is the universal rule that these plaintiffs are not entitled to injunctive relief against prosecution under the facts and circumstances in this case wherein no constitutional right asserted is denied or improperly abridged. Cf: *In Re Wykoff*, 196 F. Supp. 515, affirmed by the Fifth Circuit as reported in 6 R.R.L.R. 793. Two justices of the Supreme Court of the United States declined to change that view in an unreported decision, reported only in 6 R.R.L.R. 794. It may not be assumed that state laws may be violated with impunity simply because the person deliberately violated such laws, in furtherance of the assertion of some Civil Rights or supposed Civil Rights. The authorities cited demonstrate that the state authorities may proceed with such prosecutions in such cases unless some

vested constitutional right of such person is thereby violated. The municipality had the right to resort to state court for an injunction to quell these recurring disturbances and that course is approved here.

Finally, as to the status of the corporate plaintiff as a New York corporation seeking to domesticate in Mississippi, no contract right is involved, or impinged upon in this case. No employment by the Federal government is present. A state may not only regulate the entry of a foreign corporation into intrastate commerce, but it may exclude it all together. A state may in the exercise of its police power exclude any foreign corporation and deny it the right to do intrastate business for any reason deemed to be necessary and proper, short of arbitrary action. Mississippi would not grant a certificate of incorporation to a non-stock, non-profit corporation with a set up identical to that of the NAACP here. Pursuant to an opinion of the Attorney General, the Governor declined to admit the NAACP to do business in Mississippi. That refusal on this record is not shown by a preponderance of the evidence to be arbitrary.

The function of the Governor is domesticating a foreign corporation is not a ministerial or perfunctory act. It is a question committed to the exercise of a sound and reasonable discretion. Neither an injunction, nor a mandamus may be used to control or direct the exercise of such discretion in a particular way. Both writs are extraordinary processes, and are to issue only under the most impelling circumstances to prevent irreparable injury. The writ will not issue as a matter of right but is committed to the sound discretion of the Court. Moor v. *Texas & N.O.R.R., 297 U.S. 101, 56 S. Ct. 372. The corporation has not shown by a preponderance of the evidence that it is entitled to an injunction. It cannot be said with any degree of assurance that the refusal to domesticate it is arbitrary. The Attorney General furnished the Governor*

with his legal opinion to the effect that the NAACP did not have the requisite membership in Mississippi, and that their domestication was not in the public interest. He could have referred to instances such as its incitement to the disorders before the Court in this case, or the like, but plaintiffs say he objected to their Civil Rights suits. Surely, the corporation had the right to aid and encourage and assist negroes in the realization and enjoyment of their full constitutional rights, short of violating local laws in doing so. In any event, it has not been shown to the reasonable satisfaction of the Court that the NAACP was unlawfully denied the right to domesticate in Mississippi. It is the opinion of the Court on this record that the state had the right to reject its application to domesticate within the state under the circumstances here. Ashbury Hospital v. Cass County, 326 U.S. 207, 66 S. Ct. 61; State of Washington v. Superior Court, 289 U.S. 361, 53 S. Ct. 624; Atlantic Refining Co. v. Virginia, 302 U.S. 22, 58 S. Ct. 75; Bank of Augusta v. Earle, 13 Peters 519, 10 L. Ed. 274; Lafayette v. French, 18 Howard 404, 15 L. Ed. 451. This suit by this corporate plaintiff for this purpose cannot be maintained for another reason. This suit is in effect a suit against the State of Mississippi itself. The state is here through its officials objecting to being sued in violation of the Eleventh Amendment to the Constitution of the United States. That objection must be and is sustained. Larson v. Domestic & Foreign Corp., 337 U.S. 682.

Accordingly, the entire complaint in this case is without merit and should be dismissed at plaintiffs' cost to be taxed according to the rules of the Court. A judgment accordingly may be presented.

/s/ Harold Cox
United States District Judge

June 1, 1964

APPENDIX "B"

IN THE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21741

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,
Appellants,

versus

ALLEN THOMPSON, Mayor of the City of Jackson, Mississippi, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

(March 8, 1966.)

Before WHITAKER, Senior Judge,* WISDOM and THORNBERRY, Circuit Judges.

WHITAKER, Senior Judge: *This is an action brought in two counts by the corporate plaintiff, a New York corporation,* and several individuals, some residing without and some within the State of Mississippi, against various State, county and city officials of the State of Mississippi. In the first count, brought on behalf of the named plaintiffs and those similarly situated, they seek to enjoin the Mayor of the city of Jackson, Mississippi, the City Commissioners,

*Of the U.S. Court of Claims, sitting by designation.

the Chief of Police, the City Prosecuting Attorney, the Commissioner of the State Highway Patrol, the Sheriff of the County in which the city of Jackson is located, and others, from interfering with the free exercise of their civil rights under the Constitution of the United States and certain laws enacted in pursuance thereof. *In the second count, they seek a mandatory injunction against the Governor, the Attorney General, and the Secretary of State of Mississippi to require them to permit the corporate plaintiff to domesticate in order to do business in the State of Mississippi.*

A court of the United States, quite properly, is loathe to interfere in the internal affairs of a State. The sovereignty of the States, within the boundaries reserved to them by the Constitution, is one of the keystones upon which our government was founded and is of vital importance to its preservation. But in Clause 2 of Article VI of the Constitution of the United States it is provided:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Hence, any State law, which is in conflict with the United States Constitution or a law enacted by Congress in pursuance thereof, cannot be enforced. Nor can a valid State law be applied in a way to thwart the exercise of a right guaranteed by the Constitution and laws enacted by Congress in pursuance thereof.

So, where it is alleged that certain State laws do so conflict or are being utilized, not for legitimate State purposes, but as an expedient to deprive plaintiffs of the rights

guaranteed them by the Constitution of the United States and the laws of Congress enacted under the authority thereof, a court of the United States must entertain the suit and, if the allegations are proven, and injunctive relief appears to be required, it must issue the injunction.

We are of opinion, from a study of the District Court's findings and opinion and of the entire record, that some of the defendants, on a number of occasions, did pervert laws of the State and ordinances of the city from their rightful usage and did use them to deny to plaintiffs rights to which they were entitled under the Constitution and laws of the United States. On the other hand, we are also of the opinion that on many occasions valid State laws and municipal ordinances, enacted for the public safety and convenience, were violated by plaintiffs and that their violation was unnecessary for the full enjoyment of their rights under the Constitution and laws of the United States. The enforcement of these State laws and municipal ordinances on these occasions was a legitimate exercise of the police power of the State. Plaintiffs could not transgress valid State laws or municipal ordinances, enacted and enforced in the exercise of legitimate purposes of the State, in the assertion of rights guaranteed by the Constitution and laws of the United States, if they could assert these rights and still respect the State law. On many occasions they did not have to disregard State law or municipal ordinance to assert their Constitutional rights. See *Cox* v. *Louisiana*, 379 U.S. 536, at 554, and *Cox* v. *Louisiana*, 379 U.S. 559, at 562 and 563 (1965), and numerous cases there cited.

In the first count of their petition plaintiffs say that since May 27, 1963, they have protested defendants' asserted policy of racial discrimination by (1) picketing places of public accommodation and entering them and demanding service, and when it was refused, by remain-

ing on the premises; (2) by walking along the public streets carrying placards, but not blocking the streets or sidewalks; (3) by praying on the steps of public buildings, but not in a way to deny ingress or egress thereto, and that the defendants, in an effort to break up these demonstrations, have assaulted them, doing them serious bodily harm, and arrested hundreds of them on charges of breach of the peace, restraint of trade, trespass, obstructing traffic, and parading without a license, and requiring them to be tried separately and to post bonds ranging from $100 to $1,000 and sentencing them to pay maximum fines. They allege that they "desire, and intend, to continue to protest against the illegal use of state power by the defendants" and that "the defendants threaten to continue to harass, intimidate, threaten, and otherwise deny to the plaintiffs the right of peaceful assembly, the right of freedom of speech and of association * * *." Therefore, they pray that defendants be enjoined from preventing them from peacefully and publicly protesting racial segregation in conformity with lawful rules and regulations of the state and municipality.

In the second count plaintiffs allege that the corporate plaintiff has taken all steps, which are enumerated, requisite for domestication in the State of Mississippi, but that its application has not been granted because plaintiff's chief objective is to eliminate all forms of racial discrimination in Mississippi and elsewhere in the United States, and to assist its members and others of the Negro race to protest against such discrimination in various and sundry ways. Wherefore it prays that a mandatory injunction issue against the Governor, the Attorney General, and the Secretary of State to require them to license plaintiff corporation to do business within the State, and for other relief.

In their answers defendants denied all material allegations of the petition.

Thereafter, the case was tried on oral testimony and the affidavits filed pro and con the motion for a restraining order. The District Judge made findings of fact and a conclusion of law, upon the basis of which he dismissed the complaint. He found that on a number of occasions plaintiffs had violated State law and city ordinances in registering their protests against racial discrimination and were arrested and prosecuted therefor; but that some of the plaintiffs had been wrongfully arrested. There is evidence to support these findings, but his findings are quite brief and fail to disclose the course of conduct followed by defendants and by plaintiffs. We think this necessitates a review of the whole record and a brief summary of the credible evidence, although this means extending the length of this opinion much beyond what we like.

For years prior to 1963, the Negro community in the city of Jackson, Mississippi, had grown more and more restive under the policy of racial segregation and discrimination prevailing in that city. Aided and abetted by civil rights organizations and other white and Negro people from within and without the State of Mississippi, they organized what became known as the "Jackson Movement." Its aim was to register the protest of the Negroes against discrimination and to secure for them the equal civil rights to which they thought they were entitled.

In the spring of 1963 Negro citizens, including representatives of several "civil rights" organizations, approached the Mayor of Jackson, Allen Thompson, concerning the formation of a bi-racial committee to

negotiate a settlement of grievances of the Negroes in the city of Jackson. When it became apparent that efforts to obtain the formation of a bi-racial committee were doomed to failure, and since it was thought that plaintiffs could not adequately register their grievances through the conventional mediums of the newspapers, radio and television, they decided to, and did, encourage members of the Negro community to participate in boycotting merchants discriminating against them, in picketing, mass meetings, protest marches, and public prayer sessions. These protests and the response of city officials to them are described below.

Appellants urged Negroes in Jackson not to patronize businesses where they were not hired, where they could not be served at lunch counters, where they were not allowed to use restroom facilities, or where they were not addressed with the courtesy titles of Mr., Mrs., or Miss. They were urged to support the campaign by telephone calls, handbills, door-to-door canvassing, and speeches at mass meetings. In addition, efforts were made to picket business establishments on Capitol Street, Jackson's main shopping area, which appellants felt had policies of racial discrimination. The following are illustrative of some of the incidents which involved the picketing.

In December 1962 an interracial group of six persons proceeded to Capitol Street in an automobile with the intention of picketing the Woolworth and Shainberg stores. On arrival at their destination they got out of the car and put on signs which urged a boycott of Capitol Street because of discriminatory practices. They then started to march back and forth in front of Woolworth's and Shainberg's, walking close to the curb. There was no large crowd attracted by the picketing nor was there any blocking of the entrances to business establishments. Nonetheless, within

a short period of time all six persons involved were arrested and charged with parading without a permit and obstructing the sidewalk.

On May 28, 1963, a group of seven attempted to picket on Capitol Street with signs which read "We want equality," "Freedom Day," and "We will overcome." After proceeding about one block, they were stopped by the police and asked if they had a permit to parade. When no answer was given, the entire group was arrested and taken to the city jail.

On May 29, 1963, a group of six, carrying signs which read "Don't shop on Capitol Street," was arrested for obstructing the sidewalk within five minutes after they appeared on the street. It appears from the record that the group was proceeding single file close to the curb and was in no way hindering the flow of traffic on the sidewalk.

On June 7, 1963, five Negroes walking close to the curb and carrying small American flags were arrested for parading without a permit after they had been on Capitol Street only about ten minutes.

On June 14, 1963, one Will Palmer, while walking on Capitol Street, was arrested for parading without a permit, although he was alone at the time and was not carrying any signs or flags. He was, however, wearing a tee-shirt upon which the inscription "NAACP" appeared.

The foregoing are merely illustrative of the picketing incidents which occurred. Many other attempts to picket were made but each resulted in arrest of the participants within a very short period of time after they appeared on the street.

Another type of protest was attempts to use facilities set apart for white people only.

On May 28, 1963, five Negroes entered Primos Restaurant to ask for service. Just as they got inside they were stopped by the owner, were told they were not welcome, and were asked to leave. They refused. Within a short period of time a policeman appeared and asked them to leave. Upon their refusal to do so, all five were arrested for trespass and taken to jail.

On July 19, 1963, four Negro youths sought admission to the YMCA. They were informed by the attendant that that branch of the YMCA was reserved for white people, and after about an hour's discussion they were told to leave. They went outside and sat on the steps, and refused the requests of both the attendant and finally the president to leave. The president then called the police. When the police told them to move, and they did nothing, they were arrested for trespassing on private property.

Another incident, which occurred on May 28, 1963, involved a group of students from Tougaloo College. They entered the Woolworth store and, after purchasing some items, took seats at the lunch counter and ordered hamburgers and coffee. The waitress refused to give them service at that counter but told them that there was a counter for Negroes at the rear of the store where they could be served. When they refused to move, the lights over the counter were turned out and all the area except where the Negroes were sitting was roped off. They continued to sit at the counter for about thirty minutes. During this time a group of spectators, eventually reaching about 200 in number, gathered. Members of this group jeered, threw mustard, catsup, water and anything of a similar nature that was available at those seated at the counter. During all this time there were a number of police officers outside the store but they declined to intervene, despite several requests from the president of Tougaloo

College, on the ground that the manager of the store had not requested them to do so. Eventually, one of the spectators, Benny Oliver, pulled one of the students, Memphis Norman, off the stool upon which he was sitting, and kicked him about the stomach, head and back. At this point a plain-clothes policeman stepped in and arrested both Norman and Oliver for disturbing the peace.[1]

Another form of protest was public prayer sessions. The following is a typical example of this type of protest. On May 30, 1963, an interracial group of 13 or 14 assembled on the steps of the Post Office in Jackson to engage in a prayer session. The avowed purpose was to protest the whole system of segregation that existed in Jackson. The demonstration attracted a large crowd of spectators who cursed, jeered, and made a good deal of noise. Within a short period of time the demonstrators were ordered by policemen in the area to break up the prayer session and move on. When they refused, they were arrested and taken to the police station.

The foregoing types of protests resulted, however, in a relatively minor number of the 1,092 arrests in demonstration cases which were made in Jackson from May to the end of the summer of 1963. The greater number of arrests occurred in connection with protest marches carried on during the period.

On May 31, 1963, several hundred students gathered at the Farish Street Baptist Church. After a meeting at which several people spoke, those assembled left the church with the avowed purpose of proceeding to the City Hall to protest discriminatory practices. At the meeting instruc-

1. Subsequently, Oliver was convicted by the City Municipal Judge, fined, and given a jail sentence. The charges against Norman were dismissed.

tions were given to the marchers to march peacefully near the curb in columns of two approximately five yards apart. These instructions were for the most part carried out, although there is a conflict in the evidence on this point. The marchers proceeded south on Farish Street in the direction of the City Hall. After advancing approximately one and one-half blocks, the marchers were confronted with a line of policemen across Farish Street from sidewalk to sidewalk. A police officer, using a portable loud speaker, asked if they had a permit to parade. After someone in the front of the procession informed the police officer that it was not a parade and hence they thus did not have or need a permit, the officer stated that those who would disperse and move away peacefully would be allowed to do so, but that those who remained would be arrested for parading without a permit. After a good deal of confusion, some 322 people were arrested and transported to temporary jail facilities which had been set up at the fairgrounds.

On June 12, 1963, the day after Medgar Evers, a field representative of the National Association for the Advancement of Colored People, was killed in Jackson, a large group of Negroes assembled in the auditorium of the Masonic Temple on Lynch Street.[2] When one of the speakers asked for volunteers to march, about 150 people, two abreast, filed out of the auditorium and proceeded east, marching in the middle of Lynch Street, one of Jackson's busier thoroughfares, stopping all vehicular traffic thereon. After they had advanced about one-half block they were stopped by policemen drawn out in line, who, after asking if they had a permit to parade, ordered them to disperse. Those who remained in the street, 146 in number, were arrested for parading without a permit and taken to the temporary jail facilities at the fairgrounds.

2. The local headquarters of the NAACP was in this building.

On June 15 the officials of the city of Jackson issued a parade permit for the funeral procession of Medgar Evers. The funeral procession, consisting of several cars and an ambulance followed by about 5,000 marchers, started at the Masonic Temple on Lynch Street and proceeded to the Frazier and Collins Funeral Home on Farish Street, a distance of several miles. The march progressed in orderly fashion, without incident, from the Masonic Temple to the funeral home, but shortly after its arrival there, for reasons not entirely clear from the record, other than the tense racial situation that had been created by the death of Evers, pandemonium broke loose. Several hundred people started to advance south on Farish Street toward Capitol Street and Jackson's main shopping area, thus deviating from the proscribed route of the parade permit. They proceeded in a very disorderly manner, completely taking over the sidewalks and the street, shouting, yelling, and throwing rocks, bottles, and bricks. Within a short period of time some of the police in the area formed a line across Farish Street, advancing north along the street, and arresting those with whom they came in contact. Finally, an attorney from the Justice Department and a Negro attorney in the area were able to pacify the demonstrators and, at their request, the police lines were withdrawn and the demonstrators voluntarily dispersed. During the course of this melee, some 22 demonstrators were arrested. Fourteen policemen were injured.

The foregoing, except the Evers funeral incident, are typical illustrations of the protest marches which occurred during the period. The others, of which there were several, followed a similar pattern and concluded similarly.

This brief summary of the evidence shows the course of conduct of the parties in protesting racial discrimination and in responding thereto.

Prior to the passage of the Civil Rights Act of 1964 (78 Stat. 243, *et seq.*; 42 U.S.C. § 2000a, *et seq.*), the arrest of those persons who refused to leave the premises after having been requested to do so by the owner or his agent, may or may not have been justified, depending on all the facts. *Hamm* v. *City of Rock Hill*, 379 U.S. 306 (1964). Some of the arrests for picketing may or may not have been justified. (*Gibboney* v. *Empire Storage Co.*, 336 U.S. 490 (1949); *Hughes* v. *Superior Court*, 339 U.S. 460, 465, 466 (1950); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939)), but others were clearly unjustified. There were only a few arrests for violation of the breach of the peace statute, and these were probably justified.[3] Some of the arrests for obstructing traffic and blocking the sidewalk would appear to have been justified; others were not.

There were two ordinances prohibiting parading without a permit and another concerning the use of the sidewalks. One prohibited parades without a permit therefor issued by the Mayor. The other ordinance and a related one applicable to the use of sidewalks (Sections 134 and 135 of Uniform Traffic Regulations Code), prohibited certain enumerated acts on the streets and sidewalks, including parades, but with the proviso that "the City Council, in its discretion, may grant special permission for parades and other unusual activities on the streets, when, in its opinion, such parades or other activities will not be distracting to the extent of disturbing the usual, normal and customary uses of the streets and would not constitute a disturbance to the people living or conducting businesses thereon." Some of the arrests for violations of these ordinances would seem to have been justified but many were not.

3. Plaintiffs do not attack the validity of this statute, except as the application of it may have encroached on the assertion of their right to protest against racial discrimination.

As noted above, the arrests for parading without a permit were not only of the leaders, but of hundreds of the rank and file. When arrested, they were taken to the temporary jail facilities and there detained until bond could be made for each of them. The prosecution insisted on trying each one separately, although the facts relative to one applied to many. This clogged the court's calendar and resulted in the charges hanging over their heads for long periods of time, with eventual conviction a lively prospect.

Plaintiffs do not attack the validity of any of the statutes or ordinances; they say only that they were so applied as to deprive them of their right to protest. The record discloses a pattern of conduct on the part of the officials of the city of Jackson that leads us to the conclusion that defendants took advantage of every opportunity, serious or trivial, to break up these demonstrations in protest against racial discrimination, and that a large number of the arrests had no other motive, and some had no justification whatever, either under municipal, State, or Federal law.

Nor have we any reason to believe that there is any intention on the part of defendants to desist from such conduct in the future. We have no doubt, from their prior conduct and without any indication of a change of heart, that they still believe such demonstrations must be suppressed and that, in order to do so, they intend to take advantage of any law or ordinance, however inapplicable or however slight the transgression, and to continue to harass and intimidate plaintiffs.

Let us, however, issue this caveat to plaintiffs: It was and is incumbent on them to obey valid State laws, properly administered, while asserting their protests. If they

do disobey them, they run the risk of justified arrest and prosecution and punishment for doing so.

Plaintiffs are entitled to an injunction unless they have an adequate remedy at law.

This question gives us concern. We are unwilling to impute to the courts of the State an intention to deprive plaintiffs of any right to which they are entitled under the laws of the State or of the United States, however out of sympathy with some of those laws the court may be. We assume we can rely on them to safeguard the rights of those brought before them for trial. *Douglas* v. *Jeannette*, 319 U.S. 157 (1943); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). But this does not protect plaintiffs from harassment and intimidation by the law enforcement agencies of the city, county, and State. It does not protect them from arrest *en masse* on frivolous or unfounded charges; it does not protect them from continued arrest and incarceration until bond could be deposited for their release; it does not protect them from the long delay occasioned by the insistence of the prosecution that each one of the hundreds arrested be tried separately; it does not protect them from often expensive litigation until their rights are finally vindicated; it does not protect them from being frightened away from the lawful assertion of their rights and lawful protest against the continued denial of them.

We do not think plaintiffs have an adequate remedy at law, and that the District Judge was in error in denying the motion for an injunction and in dismissing the complaint.

In the second count of their petition, plaintiffs complain of the refusal of the Governor to permit the corporate plaintiff, a New York corporation, to domesticate. It is

a non-profit, non-share corporation, organized to promote the end of racial discrimination in the various States of the Union. It has been actively engaged in this effort for many years and in many areas of the United States, utilizing boycotts, picketing, mass demonstrations, and other means. Prior to 1963 it carried on these activities in the State of Mississippi through unincorporated affiliates, although it maintained its own office in the State; but in 1962 it received notice from the Secretary of State that the Mississippi Code had been amended, effective January 1, 1963, to require foreign non-profit corporations to domesticate in order to do business in the State. In an effort to comply therewith, it filed a copy of its charter of incorporation and of a resolution designating an agent for the service of process, both duly authenticated, paid the required filing fees, and applied for domestication.

The Mississippi law provides that upon receipt of an application for domestication, it shall be referred to the Attorney General for his opinion on whether there has been compliance with the law and whether it is to the best interest of the State to grant it or deny it. If he expresses the opinion that it is not in the best interest of the State to grant it, he is required to give his reasons therefor.

Upon receipt of plaintiff's application, the Attorney General wrote the Governor that, upon examination of the application and the statutes of the State, he was of the opinion that the application "is not authorized to be approved by your office." He did not give his reasons therefor.

In the Attorney General's testimony on the trial of this case, he stated that in his opinion he "did not deem it to be the best interest of the State of Mississippi."

He was asked if the requirements of Section 4065.3 of the Mississippi Code, requiring all State officers to undertake to maintain segregation of the races, or if the fact that the purpose of the NAACP was to aid and assist and develop the citizenship rights of Negro citizens without segregation and discrimination were factors influencing his determination. He replied in the negative but added:

> *My observation and experience with the NAACP which now covers about fourteen years led me, convinced me, that it is not to the best interest that the NAACP be domesticated, authorized to do business within the State of Mississippi. I have found that the NAACP, like a good many organizations of that kind, do not stick to the stated purposes of their corporate charter but go far beyond what their stated objectives and purposes is [sic]. For instance, your charter says nothing about the method in which the NAACP will employ in attempting to attain their objectives, it says nothing about promoting riotous parades and disorders, inflammatory speeches, meetings and things of that kind that they do indulge in, none of which is referred to of course in the charter of incorporation. That's the reason I said it was not to the best interest of the State of Mississippi for this organization to have the stamp of approval of the State of Mississippi placed upon it.*

He said that that was one of the things he took into consideration in arriving at his opinion, but that there were others.

He said that the application for domestication showed that plaintiff did not meet the requirements of Section 5310.1, which provided that three of those who applied for incorporation of a company must be residents of the State of Mississippi. Mr. McLendon, the Assistant Attorney General, said that this was the sole basis for his recommendation that plaintiff's application be denied.

*This latter objection to plaintiff's application is obviously untenable, since Section 5310.1 clearly has no application to foreign corporations seeking domestication. It applies only to persons seeking an original charter from the State of Mississippi. The statute says that corporations "may * * * be incorporated on the application of any three members, all of whom shall be adult resident citizens of the State of Mississippi, authorized by any of the said organizations, in its minutes, to apply for the charter." [Emphasis supplied.] Manifestly, this has no application to a foreign corporation seeking to domesticate. To so apply it would prevent most, if not all, foreign corporations from domesticating.*

Nor is the Attorney General's first reason, stated above, adequate grounds for denying the application. In NAACP v. Alabama, 377 U.S. 288 (1964), the Court in its opening statement in this case said it involved the right of the NAACP to carry on its activities in Alabama. In 1956 the State Attorney General had filed a bill in equity in the State court to oust the NAACP from the State and the court had issued a temporary restraining order prohibiting it from doing any business in the State and from taking any steps to qualify it to do so. The complaint detailed a number of activities of the defendant corporation, which, it was alleged, justified its ouster, among which were:

> ** * * that it had "encouraged, aided, and abetted the unlawful breach of the peace in many cities in Alabama for the purpose of gaining national notoriety and attention to enable it to raise funds under a false claim that it is for the protection of alleged constitutional rights"; [377 U.S. at 303]*

These acts were alleged

> ** * * to be "causing irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama for which criminal prosecution and civil actions at law afford no adequate relief . . . ." The complaint stated also that "the said conduct, procedure, false allegations, and methods used by Respondent render totally unacceptable to the State of Alabama and its people the said Respondent corporation and the activities and business it transacts in this State." [377 U.S. at 303]*

It will be observed that the reasons given by the Attorney General of Alabama for seeking the ouster of the corporation from the State closely parallel the reasons given by the Attorney General of Mississippi for recommending the disapproval of its application for domestication in that State.

In the case cited, the Court said, at 309:

> *There is no occasion in this case for us to consider how much survives of the principle that a State can impose such conditions as it chooses on the right of a foreign corporation to do business within the State, or can exclude it from the State altogether. E.g., Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 137. This case, in truth, involves not the privilege of a corporation to do business in a State, but rather the freedom of individuals to associate for the collective advocacy of ideas.* "Freedoms such as . . . [this] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." * * *

Accordingly, the Court reversed the Supreme Court of Alabama, which had approved the order of the lower court ousting the NAACP, and prohibiting it from doing business in the State, and directed it to enter a decree

"vacating in all respects the permanent injunction order issued by the Circuit Court of Montgomery County, Alabama, and permitting the Association to take all steps necessary to qualify it to do business in Alabama." (377 U.S. at 310.)

We think that this case is controlling here and, on its authority, a mandatory injunction must issue directing the Governor to approve plaintiff's application and directing the Secretary of State to take all needful steps to authorize the plaintiff corporation to do business in the State.

We are of the opinion that the District Court was in error in dismissing plaintiffs' complaint. The judgment of the District Court is reversed and the case is remanded to it with directions to issue the following injunction, the purpose of which is to see to it that the constitutional rights of the plaintiffs are affirmed and protected and that the right and duty of the defendants to maintain the peace are recognized and preserved:

I. The defendants, Allen Thompson, Mayor of the city of Jackson, Mississippi; D. L. Luckey and Tom Marshall, City Commissioners; W. D. Rayfield, Chief of Police of the city of Jackson; J. L. Ray, Deputy Chief of Police; M. B. Pierce, Assistant Chief of Police; J. A. Travis, City Prosecuting Attorney; R. G. Nichols, Special City Prosecutor; T. B. Birdsong, Commissioner of State Highway Patrolmen; J. R. Gilfoy, Sheriff of Hinds County; and Paul G. Alexander, County Attorney of Hinds County, Mississippi; their successors in office, their agents, servants and employees, are hereby enjoined as follows:

(a) From denying to Negro citizens the right to protest racial discrimination near any place of public accommodation, as defined by the Civil Rights Act of 1964, or near any place, service or facility operated by the State

of Mississippi or an agency thereof or in whose operation or maintenance State action is involved, by peacefully in small numbers picketing such establishments in a manner so as not to interfere with pedestrian or vehicular traffic and in a manner so as not to block entrances or exits to or from the picketed establishments;

(b) From denying to Negro citizens equal access to and equal treatment in any place of public accommodation as defined by the Civil Rights Act of 1964, or in any place, service or facility operated or maintained by the State of Mississippi or an agency thereof or in whose operation or maintenance State action is involved;

(c) From denying to Negro citizens the right to participate in protests against racial discrimination in the city of Jackson, Mississippi, in front of any Federal, State, County or Municipal building in small groups of reasonable size and at reasonable times in a manner so as not to interfere with pedestrian or vehicular traffic and in a manner so as not to block entrances thereto or exits therefrom;

(d) From denying to Negro citizens the right to peacefully protest against racial discrimination in the city of Jackson, Mississippi, by peacefully walking upon the public sidewalks of the city of Jackson, observing all traffic signals, walking close to the building line or close to the curb so as not to interfere with or obstruct other pedestrian traffic on the sidewalk, and peacefully assembling in front of any Federal, State, County or Municipal building and speaking out against said discrimination for a reasonable period of time, when traffic to and from places of business or employment is not at its peak, and in such manner as not to block entrances thereto or exits therefrom and as not to unduly disrupt the public peace, and as not to deprive the public of adequate police and fire protection;

(e) From prohibiting or preventing the activities described in paragraphs (a), (b), (c), and (d), *supra*, by the unreasonable denial of permits or other appropriate permission, and by arrests, threats of arrest, harassment or intimidation.

II. The defendants, Ross R. Barnett, Governor of the State of Mississippi; Joe T. Patterson, Attorney General; and Heber Ladner, Secretary of State; their successors in office, their agents, servants and employees, are hereby required to approve the application for domestication of the NAACP and to take all necessary and proper steps to entitle it to do business in the State of Mississippi.

APPENDIX "C"

§ 5310.1. Corporate charters—nonprofit nonshare corporations.

1. The local lodges, chapters or councils, by whatever name known, of the Masons, Odd Fellows, Knights of Pythias, Elks, Woodmen of the World, and other fraternal organizations, together with temperance societies and charitable associations, schools, churches, literary institutions, lyceum associations, religious societies, fire companies, mechanics associations, fair associations, agricultural societies, civic improvement societies, associations for the establishment of college scholarships on a long-term payment plan, corporations to own and operate rural waterworks systems, rural sewage disposal systems, to provide uniform low cost multi-family housing, cemeteries and corporations for dental services, medical and surgical purposes or for establishing, maintaining and operating local clinical, pathological, medical or surgical research laboratories, hospitals, institutions of learning and gymnasiums, may likewise be incorporated on the application of

any three (3) members, all of whom shall be adult resident citizens of the State of Mississippi, authorized by any of the said organizations, in its minutes, to apply for the charter.

2. The three (3) persons authorized as above provided shall prepare an instrument to be styled: "The charter of incorporation of (naming corporation)," and containing in appropriate paragraphs the following information: (1) the corporate title of said company; (2) the names and post office addresses of the incorporators; (3) the domicile of the corporation in this state; (4) a statement that the corporation is nonprofit and that no shares of stock are to be issued; (5) the period of existence shall be stated as perpetual; (6) the purposes for which the corporation is created, not contrary to law, including a statement of the rights and powers that are to be exercised by said corporation, which said rights and powers shall be limited to those reasonably necessary to accomplish the stated purpose of the association being incorporated; (7) such corporations shall not be required to make publication of their charters, shall issue no shares of stock, shall divide no dividends or profits among their members, shall make expulsion the only remedy for non-payment of dues, shall vest in each member the right to one vote in the election of all officers, shall make the loss of membership, by death or otherwise, the termination of all interest of such members in the corporate assets, and there shall be no individual liabilities against the members for corporate debts, but the entire corporate property shall be liable for the claims of creditors; (8) said instrument, when signed by each of the incorporators and acknowledged by each before a notary public or other officer authorized by law to take acknowledgments may be filed with the Secretary of State at any time thereafter within six (6) months of the date of the

last acknowledgment. The Secretary of State, upon receipt of such instrument, shall endorse upon it the following:

"Received at the office of the Secretary of State this, the ..... day of ....., A.D., ..., together with the sum of $ ..... deposited to cover the recording fee and referred to the Attorney General for his opinion.

(Signed) .....
Secretary of State"

Upon receipt of the foregoing application from the Secretary of State, the Attorney General, or his assistants at his direction, may, in his discretion, make such investigation as he may deem necessary to determine in his opinion whether the issuance of the charter to the corporation as applied for is contrary to the best interest of the State of Mississippi, and the applicants and all persons interested in such application shall cooperate with the Attorney General; and thereupon should he be of the opinion that the issuance of the charter as applied for is not to the best interest of the State of Mississippi, even though the application on its face is not violative of the Constitution or the Laws of the State of Mississippi, he shall prepare and submit to the Governor of the State of Mississippi his opinion why the issuance of such charter would not be to the best interest of the State of Mississippi, and which shall be by separate document accompanying the application.

The Attorney General shall not be liable officially or individually in libel, slander, or in any other action in any way because of such opinion or its contents or in connection therewith.

The Attorney General shall without unreasonable delay refer the same to the Governor for his approval or disapproval. The Governor shall return it to the Secretary of

State with his action endorsed thereon. If he approves it, the Secretary of State shall record it in the record kept in his office for that purpose, and certify to the same under the great seal of this state, and transmit it to the applicants; if the Governor disapproves it, the Secretary of State shall file it in his office and notify the applicants of the disapproval and state the reasons therefor. If within thirty (30) days after the Secretary of State has mailed the said notice they have not amended it so as to meet the approval of the Governor, the Secretary of State shall return the fee to the applicants, less the sum of Three Dollars ($3.00), which shall be paid into the State Treasury for "charters examined, disallowed and filed."

The powers specified in the charter shall, by the approval of the charter, be vested in the corporation and it shall thereupon go into operation; provided, however, before any such corporation shall construct, operate or maintain a water transmission or distribution system for the sale of water to the public it shall obtain a certificate of public convenience and necessity from the Public Service Commission, pursuant to the provisions of Chapter 372 of the General Laws of 1956 [§§ 7716-01 et seq.] of the State of Mississippi.

The powers specified in the charter shall, by the approval of the charter, be vested in the corporation and it shall thereupon go into operation.

All such charters, whether heretofore or hereafter granted, are and shall be designated as nonprofit nonshare corporations, and the terms of all such charters, whether heretofore or hereafter granted, shall be perpetual, provided, nevertheless, that same shall be subject at all times to alteration, amendment or repeal.

3. Each provision of this act is hereby declared to be severable and in the event any word, portion, or clause of this act be held to be unconstitutional, such shall not affect or invalidate the remaining portion thereof.

§ 5319. Resident agent of nonprofit nonshare or nonprofit or nonshare corporations: How designated.

Every nonprofit nonshare or nonprofit or nonshare corporation, organized or domesticated under the laws of the State of Mississippi, shall maintain an office in the county of its domicile in this state, in charge of an officer or officers of the corporation, or designate and appoint a resident agent for the service of process by the directors (by whatever name called) of such corporation, a duly certified copy of the resolution designating such resident agent, and the written acceptance of such agency by the agent, to be filed with the Secretary of State, and the Secretary of State and his successors in office may be designated and appointed such agent in said manner and such designation and appointment may be so accepted and if accepted shall be so filed. A fee of Five Dollars ($5.00) shall be paid to the Secretary of State for each designation and appointment of agent filed by him.

No such corporation shall do any business in the State of Mississippi until and unless it shall so maintain an office in the county of its domicile in this state, in charge of an officer or officers of the corporation, or it shall have filed a written power of attorney designating the Secretary of State of the State of Mississippi, or in lieu thereof an agent as above provided in this section upon whom service of process may be had in event of any suit against said corporation. The Secretary of State shall be allowed such fees therefor as are provided by law for designating resident agents.

Any such corporation failing to comply with the above provisions as to maintaining an office or agent for process shall not be permitted to bring or maintain any action or suit in any of the courts of this state. The failure of any such corporation to comply with the foregoing provisions shall constitute a violation of the laws of the State of Mississippi and subject said corporation to a penalty of not more than One Hundred Dollars ($100.00) to be recovered by the Attorney General of Mississippi, or any District Attorney at the request of the Attorney General, in the Chancery Court of the county where such corporation has done such business or wherever such corporation may be found.

In the event of death, resignation or removal of such resident agent, another shall be substituted within thirty (30) days in the same manner and accompanied by the same fee as in the former appointment; and until such substitution or, in the event of the failure of such corporation to designate and qualify a resident agent where one is required by this Act, the Secretary of State shall be the resident agent for the service of process upon such corporation without resident agent until one shall have been designated as herein provided.

The resident agent of any such corporation shall be a person or persons residing in this state or a corporation, domestic or foreign, duly authorized to do business in this state and authorized by its charter or articles of incorporation or other instrument by which it is created to act as such agent. If the resident agent be a corporation, service of process upon it as such agent may be made at its registered office in this state by service on the president, vice-president, an assistant vice-president, the secretary or an assistant secretary of such resident agent.

No foreign nonprofit nonshare or nonprofit or nonshare corporation shall do business in the State of Mississippi until it has first been domesticated according to the laws of the State of Mississippi, and any such corporation so doing business without such domestication shall not be permitted to bring or maintain any action or suit in any of the courts of this state.

Any such corporation or any person or group of persons found carrying on any of such corporations businesses or functions by soliciting funds, holding meetings, maintaining offices, circulating literature, or performing any other business or function in the name of such corporation that has not qualified to do business in this state in the manner provided by law may be enjoined by suit in the Chancery Court of the First Judicial District of Hinds County brought by the Attorney General in the name of the State of Mississippi.

SOURCES: Laws, 1958, ch. 200; 1962, ch. 235, § 150, eff from and after January 1, 1963.

§ 5339. Foreign corporations may be domesticated.

Every company or corporation incorporated under the laws of any other state, territory or country, now doing business in this state, or hereafter desiring to do business in this state, and desiring to become a domestic corporation in this state, may file with the governor of the state a copy of its charter, or articles of incorporation or association, or in case such company or corporation is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly authenticated and certified under

the great seal of the state in which it was incorporated by charter or certificate.

SOURCES: Codes, 1906, § 915.

§ 5340. Foreign corporations may be domesticated—attorney-general and the governor to approve charter.

When said copy has been filed with the governor of this state, he shall first take the advice of the attorney-general of the state as to the constitutionality and legality of the provisions of such charter or articles of incorporation or association, and if the attorney-general shall certify to the governor that he finds nothing in said charter or articles of incorporation or association that are violative of the constitution or laws of this state, the governor of the state may approve the same, and he shall write his approval at the bottom of said charter or articles of incorporation or association or certificate of incorporation, and shall sign his name thereto, and shall cause the great seal of the state to be thereto affixed by the secretary of state; but the governor may require amendments or alterations to be made previous to signing same, or if deemed expedient by him he may withhold his approval entirely.

SOURCES: Codes, 1906, § 916.

§ 5341. Foreign corporations may be domesticated—charter to be recorded by secretary of state.

The secretary of state shall then cause all such charters or articles of incorporation or association, or certificate of incorporation, after he has received the same from the governor with his approval as provided in the preceding section, to be duly recorded in a book to be kept for that

purpose, and shall cause to be issued to said corporation a copy of the charter or articles of incorporation or certificate so filed properly certified under the seal of his office, and a copy of such charter of incorporation or articles of incorporation, or certificate certified to by the secretary of state, shall be taken by all courts of this state as evidence that the said corporation has complied with the provisions of this act, and is entitled to all the rights and benefits therein conferred, but said corporation shall pay to the secretary of state the same fees required of similar corporations formed under the laws of this state. Any corporation shall, upon compliance with this law, become to all intents and purposes a corporation of this state, and shall be entitled to all the rights and privileges and be subject to all the duties, obligations, restrictions, liabilities, limits and penalties conferred and imposed by laws of this state upon similar corporations incorporated under the laws of this state.

SOURCES: Codes, 1906, § 917.

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1965

No. 21741

D. C. Docket No. 3432-Civil Action

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,
Appellants,

versus

ALLEN THOMPSON, Mayor of the City of Jackson, Mississippi; ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

Before WHITAKER, Senior Judge,* WISDOM and THORNBERRY, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the

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*Of the U. S. Court of Claims, sitting by designation.

Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court with directions, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, Allen Thompson, Mayor of the City of Jackson, Mississippi, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate: March 8, 1966

APPENDIX "E"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21741

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,
Appellants,

vs.

ALLEN THOMPSON, MAYOR OF THE CITY OF JACKSON, MISSISSIPPI, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi, Jackson Division.

(April 20, 1966)

On Petition for Rehearing

Before WHITAKER, Senior Judge,* and WISDOM and THORNBERRY, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed by appellees on the issues raised in Count II of the original Complaint is hereby

DENIED.

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*Of the U. S. Court of Claims, sitting by designation.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 172

PAUL B. JOHNSON, GOVERNOR, *et al*
Petitioners

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLERED PEOPLE, ROY WILKINS, CHARLES EVERS, WILLIE B. LUDDIN, REV. RALPH EDWIN KING, DORIS ERSKINE and DORIS ALLISON

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1966

No. 172

PAUL B. JOHNSON, GOVERNOR, *et al*

Petitioners

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ROY WILKINS, CHARLES EVERS, WILLIE B. LUDDIN, REV. RALPH EDWIN KING, DORIS ERSKINE and DORIS ALLISON

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Question Presented

Whether exclusion of the corporate respondent from the State of Mississippi through refusal of domestication because of its activities to achieve equal rights for Negroes contravenes the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

Counter-Statement of the Case

This action, commenced in the U. S. District Court for the Southern District of Mississippi on June 7, 1963 by individuals, by members of the NAACP and by that corporation sought both temporary and permanent injunctive relief against officials of the City of Jackson, of the County

of Hinds, and of the State of Mississippi who had *inter alia* failed to act upon the corporate respondent's request for registration required by state law, and, through policies of arrest and harassment, had suppressed rights guaranteed by the First Amendment (R. 2-45). The District Court which denied all relief was reversed by the court below and directed to enter injunctions against city, county and state officials prohibiting interference with certain forms of protected expression and specifically, a mandatory injunction against the Governor, Attorney General and Secretary of State, their successors in office, their agents, servants and employees requiring approval the application for domestication of the NAACP and "to take all necessary and proper steps to entitle it to do business in the State of Mississippi" (P-A 42).[1] The petition for writ of certiorari is from this latter part of the judgment of the court below.

The NAACP is a non-profit non-share member corporation chartered under the laws of the State of New York and organized to end discrimination affecting Negroes by all lawful means (R. 394). It has local affiliates, called branches, in over 1000 communities in 49 states.[2] It is an association of individuals who acquire dual membership in both the national and the local affiliate by subscribing to the principles of the organization and by paying a membership fee (R. 396).

Individuals organized into branches of the corporate respondent, National Association for the Advancement of Colored People (NAACP) have been active in the State of Mississippi for many years prior to 1963 (R. 476, 340), and a Field Secretary's office has been maintained in Jackson at least since 1954 (R. 471; 474).

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[1] The Appendix to the Petition for a Writ of Certiorari will appear as (P-A).

[2] Final disposition of NAACP v. Alabama, 377 U. S. 288 (1964) has resulted in branches in 50 states.

In Mississippi, NAACP works to achieve equal rights of Negroes, by litigation of unjust laws, encouraging registration and voting, desegregating public facilities including schools and ending police brutality (R. 420-421). In this effort, NAACP has worked with other groups who share its views (R. 436, 493, 506-507), has participated with them in selective buying campaigns (R. 445), and in picketing and other public protest activities (R. 421).

Prior to 1963, Mississippi had no requirement for registration or domestication of foreign non-profit corporations. Pursuant to a 1962 notice from the Secretary of State that the laws had been changed by amendment of Section 5319, Mississippi Code of 1942, Recp., and that effective January 1, 1963, such corporations would be required to "domesticate" by the filing of an application and a certified designation of a local agent for service of process, on November 27, 1962 the corporate respondent filed an application and a certified designation of a local agent for service of process, with appended acceptance by the agent, together with an authenticated copy of its articles of incorporation, requisite filing fees, and a request that the organization be domesticated (R. 80). These acts were pursuant to the sixth paragraph of the amended Section 5319 (which formerly applied only to profit-making corporations) and to Section 5339 of the Mississippi Code of 1942.

Prior to commencement of this action, petitioners had neither acted upon the corporate respondent's application nor advised it of any disposition (R. 315-316). Subsequent to the filing of this action, petitioners produced a letter from former Governor Barnett (in whose stead the present Governor has been substituted (R. 130)), dated June 17, 1963, and a letter from petitioner Ladner to the President of respondent corporation advising it of the Governor's refusal to approve its application for domestication (R. 83-84). During a hearing on June 24, 1963, on respondent's

request for temporary injunctive relief, petitioner Attorney General Patterson produced a letter to Governor Barnett dated January 29, 1963, setting forth the Attorney General's opinion that the application for domestication by appellant corporation "is not authorized to be approved by your office" (R. 327); he testified that his opinion was based upon his belief that domestication of respondent corporation would not be "in the best interest" of the State of Mississippi and upon respondent corporation's failure to comply with Section 5310.1 of the Mississippi Code of 1942 as a prerequisite to domestication. Finally, on July 11, 1963, the President of respondent corporation was formally advised that the Governor had declined to approve the application for domestication in the State of Mississippi.

In explanation of his determination that domestication would not be in the best interests of the State of Mississippi, the Attorney General testified:

> My observation and experience with the NAACP which now covers about fourteen years led me, convinced me, that it is not to the best interest that the NAACP be domesticated, authorized to do business within the State of Mississippi. I have found that the NAACP, like a good many organizations of that kind, do not stick to the stated purposes of their corporate charter but go far beyond what their stated objectives and purposes is [sic]. For instance, your charter says nothing about the method in which the NAACP will employ in attempting to attain their objectives, it say nothing about promoting riotous parades and disorders, inflammatory speeches, meetings and things of that kind that they do indulge in, none of which is referred to of course in the charter of incorporation. That's the reason I said it was not to the best interest of the State of Mississippi for this organization to have the stamp of approval of the State of Mississippi placed upon it (R. 340).

and that the NAACP promoted and "stirred up" litigation dealing with civil rights (R. 344).

Interpolation of Section 5310.1 into the requirements for domestication of a foreign non-profit corporation resulted from the testimony of the Attorney General followed by that of the Assistant Attorney General:

> Q. . . . the question is did you determine that it violated any provision any specific provision of the Constitution or laws of the State? A. Except to one extent, further extent dealing with non-profit non-share corporations Subsection 1 of Section 5310.1 which provides among other things that three members of all of whom shall be adult resident citizens of the State of Mississippi authorized by any of said organizations in its minutes to apply for the charter that deals with granting of charters to non-profit non-share corporations.
>
> Q. Do I understand that you made an investigation and determined that this application did not comply with that provision of the charter? A. It does not comply on its face. Your certified copy of your charter of incorporation shows it to be a New York non-profit corporation, the incorporators all being residents of the State of New York or some other state close to the reby [sic].
>
> Q. Do I understand you to be saying sir that this section of the statute to which you are referring applies to foreign corporations seeking domestication? In other words a foreign corporation seeking domestication? A. That has always been our position that a foreign corporation certainly must comply with our own laws to be entitled to domestication.
>
> Q. I want to be sure I understand that includes then a requirement that the foreign corporation seeking domestication must include three residents of the State of Mississippi in its uh board of directors? A. That's right.[3]
>
> * * *
>
> A. As he explained to you Mississippi statute 5310.1 requires that all domestic non-profit corporations consist of members who are residents of Mississippi and of course that is the would apply to foreign cor-

[3] Testimony of the Assistant Attorney General.

> porations that applied for domestication because under the theory we think it's sound that you can't do indirectly what you cannot do directly and in order for a corporation to take on a non-profit or an association to take on a non-profit structure and thereby would be entitled to tax and other advantages offered by the State of Mississippi the legislature deemed it proper that they should be resident (R. 348).[4]

In their answer to the complaint which was filed June 27, 1963, petitioners admit that one of the duties of petitioner Patterson "is prosecuting foreign corporations unlawfully doing business in the State of Mississippi . . ." (R. 80), that the corporate respondent filed an application for domestication which has been denied, that petitioners have refused to approve that application for domestication, and that the corporate respondent ". . . is a foreign non-profit corporation operating and doing business in the State of Mississippi contrary to the provisions of State law" (R. 80-81).

The District Court dismissed the complaint, denied all relief, and found that respondents had not been shown to the court's satisfaction that denial of domestication was unlawful and that the suit violated the Eleventh Amendment. The court below reversed on the ground that interpolation of Section 5310.1, which relates applicants for original charters, was patently untenable and that the basis for exclusion of NAACP from the State violated the Fourteenth Amendment.

Reasons for Denial of Writ

1. The decision of the court below is in accord with prior decisions of this Court, *NAACP* v. *Alabama,* 377 U. S. 288 (1964), *NAACP* v. *Button,* 371 U. S. 415 (1963), *NAACP* v. *Alabama,* 357 U. S. 449 (1958), *Terral* v. *Burke Construc-*

[4] Testimony of the Attorney General.

tion Co., 257 U. S. 527 (1922), *Harrison* v. *St. Louis, San Francisco Railroad Company*, 232 U. S. 318 (1914), and is consistent with the accepted and usual course of judicial proceedings thereby obviating the need for review by this Court. *Ex parte Young*, 209 U. S. 123 (1908); *Griffin* v. *Sch. Bd. of Prince Edward Co.*, 377 U. S. 218, 228 (1964).

The grounds asserted for ousting the corporate respondent from the State of Mississippi, as stated by the Attorney General, bring this case within the *ratio decidendi* of *NAACP* v. *Alabama*, 377 U. S. 288 (1964) which declares as unconstitutional the "denial of the right to associate for the advocacy of ideas by lawful means." Under no circumstances can a governmental purpose to inhibit and suppress assembly, expression and advocacy of unpopular ideas be considered as a legitmate and valid exercise of state police power sufficient to deny to the corporate respondent the right to engage in civil rights activities within the State.

Moreover,

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved (*Shelton* v. *Tucker*, 364 U. S. 479 at p. 488).

The reason for the denial of the domestication of the corporate respondent is clear (R. 340). Having determined that the activities of the NAACP and its branches were inimical to the retention of segregation and discrimination in Mississippi, petitioners sought to exclude it from the state and by termination of its operations, silence the voice of its members and inhibit concerted and organized political expression and group activity. Association of individuals within the framework of the NAACP affords a form of political expression protected by the Fourteenth Amendment and necessary to effectuate the meaning and purpose of the First Amendment's right to association.

NAACP v. *Button, supra.* The social, legal and economic benefits which accrue to members of respondent corporation, by virtue of their membership, reinforce their effectiveness and the effectiveness of their activities purposed to achieve the aims of the NAACP, *i.e.*, the eradication of racial segregation and discrimination by all lawful means. As this Court stated in *NAACP* v. *Alabama,* 357 U. S. 449 at page 459 (1958):

> . . . it [the NAACP] and its members are in every practical sense identical. The Association, which provides in its constitution that "[a]ny person who is in accordance with [its] principles and policies . . ." may become a member, is but the medium through which its individual members seek to make more effective the expression of their views.

And at page 460:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

What this Court has sought to eliminate by its decisions enunciating the inviolability of freedom of association is potential and actual unconstitutional intimidation of the free exercise of the right to advocate, to litigate and to join together to strengthen expression. Accordingly, governmental action, by any means, which would restrict these rights must bear a relevant correlation to the governmental function sought to be served. Denial of domestication to and, therefore, exclusion of the corporate respondent from the State of Mississippi through the acts of its officials infringes upon Fourteenth Amendment guarantees. This is particularly so in this case where neither of the two reasons provided by the office of the Attorney General for its opinion, which was transmitted to the Gov-

ernor, that the corporate respondent's application was "not authorized to be approved by your [the Governor's] office" (R. 327) survive the test of constitutionality. The first, that domestication of the NAACP was not "in the best interest of Mississippi" because the organization encouraged and conducted activities to achieve civil rights for Negroes, to protest denial of these rights and promoted and "stirred up litigation" to achieve these rights (R. 340, 340) is unacceptable under settled principles of law. *NAACP* v. *Button, supra; NAACP* v. *Alabama,* 357 U. S. 449 (1958); 377 U. S. 288 (1964).

Litigation to achieve the aims of the NAACP, the lawful objectives of equality of treatment for Negroes was recognized as a constitutionally protected form of political expression in *NAACP* v. *Button, supra.* The denial of domestication, in the light of the provision of Section 5319 proscribing litigation in the state courts to any "such corporation so doing business without such domestication" [P-A 48] is a further violation of the due process clause of the Fourteenth Amendment. This prohibition, coupled with the threat of injunction against any corporation or group of persons carrying on business or performing any function in the name of the corporation "that has not qualified to do business in" the state "in the manner provided by law" (P–A 48) is that same "threat of sanctions" held to unconstitutionally deter the exercise of First Amendment freedoms in *NAACP* v. *Button, supra.* See also *Dombrowski* v. *Pfister,* 380 U. S. 479, 486-487 (1965).

In *NAACP* v. *Alabama,* 377 U. S. 288 (1964) this Court recognized that although the compelled disclosure of the names of members of the corporate respondent would effect the likelihood of a substantial restraint upon the exercises of the NAACP's members' rights to freedom of association, the complete suppression of the Association's activities in a state is an even more serious abridgement of that

right. That the State of Mississippi has sought to accomplish this end through a variation of the means employed in Alabama does not distinguish the purpose or effect of its actions. As in *NAACP* v. *Alabama, supra*, this case "in truth, involves not the privilege of a corporation to do business in a state, but rather the freedom of individuals to associate for the collective advocacy of ideas. (377 U. S. at p. 307.) Invasion of the right to freedom of expression cannot be successfully obscured by the recitation of irrelevant principles of corporate law which represent the proscribed subtle governmental interference with First Amendment freedoms recognized in *Bates* v. *Little Rock*, 360 U. S. 516 (1960).

2. The unlawfulness of the ouster of the corporate respondent attempted by petitioners is demonstrated by the facts. Admittedly, units of the NAACP have been active in Mississippi for a considerable number of years (R. 341, 474); and a paid State Field Secretary of the corporate respondent has maintained an office in Jackson since 1954. The NAACP is, in fact, in Mississippi. Prior to the 1962 amendments to the corporation laws of the State, there was no requirement for registration or domestication of foreign non-profit, non-share corporations. Section 5319 of the Mississippi Code of 1942, Recp. which requires a resident agent, originally applied to profit-making commercial stock corporations. In 1962, that section was amended to apply to "Nonprofit, Nonshare or Nonprofit or Nonshare Corporations." In addition to requiring of such corporations "organized or domesticated under the laws of the State of Mississippi . . .", designation of an agent for service of process or written power of attorney designating the Secretary of State as agent, upon penalty of restriction from the courts and a fine, there was added those sections which precipitate the question before this Court. The final two paragraphs of Section 5319 provide that no foreign non-profit or non-share corporation ". . . *shall do business in the State* . . . until it has first

been domesticated according to the laws of the State of Mississippi . . ." and further, restricts such corporation from bringing or maintaining any action in the state courts. The final paragraph of this section provides:

> Any such corporation or any person or group of persons found carrying on any of such corporations businesses or functions by soliciting funds, holding meetings, maintaining offices, circulating literature, or performing any other business or function in the name of such corporation that has not qualified to do business in this state in the manner provided by law may be enjoined by suit in the Chancery Court of the First Judicial District of Hinds County brought by the Attorney General in the name of the State of Mississippi.

That Mississippi recognizes the difference between commercial and non-profit corporations is implicit in its laws which provide for the organization of domestic non-profit and business corporations in distinct sections of the Code. (Compare Miss. Business Corp. Act P.B. #1712, regular session 1962, Section 2-105, with Section 5310.1, Miss. Code of 1942, Recp.) Whereas the Mississippi Business Corporations Act of 1962 makes specific provisions for admission of foreign business corporations (Sections 106-112), no similar provision is provided for nonshare, nonprofit corporations. It is significant that pursuant to Section 105 of the Business Corporation Law, the transaction of business requires a certificate of authority (which is specifically denied to foreign non-profit non-share corporations) procurable from the Secretary of State upon compliance with minimal and reasonable regulations and payment of a fee. (See Section 110.) Additionally, Section 105 specifically provides that while foreign business corporations for profit shall not have the right to transact business in the state prior to procuring a certificate of authority, the maintenance and defense of actions, maintenance of offices for transfer and exchange of securities, maintenance of bank accounts, solicitation of orders requiring acceptance out

of state, transacting business in interstate commerce, conduct of isolated transactions and investing in or acquiring mineral interests in transactions outside of Mississippi are not the "transaction of business."

Section 150 amends existing law to require, by virtue of Section 5319, domestication as a prerequisite to use of state courts and to carrying on of any business in the name of a corporation "that has not qualified to do business . . . in the manner provided by law"; these functions being subject to termination by an injunction action by the Attorney General. Whereas Alabama in *NAACP* v. *Alabama, supra,* applied existing law and acquired an ex parte injunction to silence the unpopular voice of the corporate respondent and its members for seven years, little perspicacity is necessary to see the preparation for similar frustration of freedom of association by the legislature and officers of the State of Mississippi. The only method for lawful operation of a foreign non-profit, non-share or non-profit or non-share corporation in the State of Mississippi is available through domestications as set forth in Sections 5339-5341 of the Mississippi Code.

3. The denial of domestication under the circumstances of this case infringes upon the corporate respondent's right to equal protection of the laws. It is significant that those foreign commercial corporations normally sought to be controlled by conditions of admission into a State are afforded unfettered opportunity to conform and comply. Conversely, the corporate respondent, a vehicle for political expression considered obnoxious because of its civil rights aims and activities is sought to be silenced and excluded from operation, by reason of the peculiar amendment of Mississippi statutes.

The reasons for denial of domestication offered by petitioners, together with the amendments to Section 5319, are more than suspect under the equal protection and commerce clauses. There is no residence requirement for

commercial foreign corporations under the Business Corporations Law, and these amendments are tailored to exclude the NAACP.

Petitioners' contention that a state's power to exclude a foreign corporation is here absolute is similarly unfounded in relation to the equal protection clause. The fact that no non-profit corporation had met the approval of the Attorney General's office since 1958 (R. 360) is irrelevant and of no probative value since the restrictive provisions requiring domestication of such corporations as a condition of doing business, holding meetings and participating in litigation in the State courts were not imposed until Section 5319 was amended in 1962 to become effective January 1, 1963.

2. In the light of the foregoing proscriptions against state suppression of freedom of association, nothing substantial remains of the principles of exclusion of foreign corporations sought to be raised by petitioners.

The power of a state to exclude a foreign corporation is not absolute, but is limited by the constitutional rights to due process and equal protection of the laws encompassed in the Fourteenth Amendment and by the Commerce Clause. *Southern Railway* v. *Greene*, 216 U. S. 400 (1910); *Freeman* v. *Hewit*, 329 U. S. 249 (1946); *Crutcher* v. *Kentucky*, 141 U. S. 47 (1891). The theory of the power of exclusion originated in the colonial era and related to expansive trading companies, the distinguishing feature of which was monopoly rather than legal personality. *Bank of United States* v. *Deveaux*, 9 U. S. (9 Cranch.) 61 (1809), recognized the right of a corporation to sue in states other than that of its charter and thereby destroyed preexisting restrictive principles. A corporation is a person within the Fourteenth Amendment, hence arbitrary exclusion or expulsion without any reasonable opportunity to qualify is without a rational purpose except that of exclusion itself and violates due process of law.

Gulf, C. & S. F. Ry. Co. v. *Ellis*, 165 U. S. 150 (1897), *Liggett* v. *Baldridge*, 278 U. S. 105 (1928), *Watson* v. *Employees Liability Corp.*, 348 U. S. 66, 80, 82 (1954). Just as a state may not exclude a foreign corporation where that exclusion is utilized to achieve a forbidden result, *i.e.*, the interference with interstate commerce or restriction of resort to federal courts, it may not exclude or expel to stifle protected forms of expression and association and thereby silence dissent. *Hanover Fire Ins. Co.* v. *Carr*, 272 U. S. 494 (1926); *Terral* v. *Burke Construction Co.*, *supra*; *NAACP* v. *Alabama*, 377 U. S. 288 (1964).

The second reason offered by petitioners as the basis for denial of domestication does not survive scrutiny. The application of the corporate respondent is charged as being inconsistent with Section 5310.1, a provision concerning initial incorporation of domestic non-profit, non-share corporations which requires that applicants for a charter be residents of Mississippi (R. 348) or that all members be Mississippi residents (R. 348). The interpolation of Section 5310.1 into provisions dealing with foreign corporations is refuted by the plain meaning of the corporation laws of Mississippi. This condition is but a fallacious subterfuge to disguise the suppression of freedom of expression and association. Requirements for incorporation in other states insure the impossibility of most, if not all foreign corporations from domesticating, were such a condition to have any validity. Both reasons are insufficient and run afoul of the Fourteenth Amendment.

As is vividly demonstrated, the provisions regarding domestication present no standards. They are susceptible of and indeed have been applied in such broad and sweeping terms as to render them unconstitutionally void and uncertain. In *Burns Baking Co.* v. *Bryan*, 264 U. S. 504 (1924) this Court stated at page 513:

> . . . A state may not, under guise of protecting the public, arbitrarily interfere with private busi-

> ness or prohibit lawful occupation or impose unreasonable and unnecessary restrictions upon them. *Lawton* v. *Stelle,* 152 U. S. 133, 137; *Meyer* v. *Nebraska,* 262 U. S. 390, 399.

See also *Hornsby* v. *Allen,* 326 F. 2 605 (5th Cir. 1964). While the doing of business in a state by a foreign corporation is admittedly a privilege, that privilege cannot be denied where, as in this case, that denial infringes upon constitutional rights of expression, association and advocacy before the courts. *NAACP* v. *Alabama,* 377 U. S. 288 (1964); *Louisiana* v. *NAACP,* 366 U. S. 293 (1961); *NAACP* v. *Button, supra.* Needless denial of that privilege is unconstitutional where the state discriminates in its rendition, *Yick Wo.* v. *Hopkins,* 118 U. S. 356 (1886), wields its power in such a manner as to deny due process or to discourage certain forms of voluntary association. *Shelton* v. *Tucker, supra.*

The corporate respondent represents a form of constitutionally protected political expression, and restrictions on its activities must be those of imperative need, whether a right or privilege be involved. Exclusion can be justified only by that compelling need reasonably related to the state's objectives, a factor lacking in this case. *NAACP* v. *Alabama,* 377 U. S. 288 (1964); *Dean Milk* v. *City of Madison,* 340 U. S. 349 (1951).

Petitioner's answer admits that the corporate respondent was "operating and doing business . . . contrary to . . . state law . . . " and was "unlawfully doing business" in the State (R. 80-81). Petitioners' contention that the corporate respondent is in no peril by its lack of domestication is refuted by their answer. Moreover, their lack of "militancy" or invocation of the injunction procedure provided, is secured by virtue of the jurisdiction of the federal courts having initially attached. It is well settled that the tribunal first-acquiring jurisdiction holds it to the exclusion of all others until final disposition of the cause. *Freeman* v. *Howe,* 65 U. S. (24 How.) 450 (1860); *Buck* v. *Colbath,* 70 U. S. 3 Wall. 334 (1865); *Taylor* v. *Taintor,* 83 U. S. 16

Wall. 366 (1872); *Ex Parte Crouch,* 112 U. S. 178 (1884); *Harkrader* v. *Wadley,* 172 U. S. 148, 164 (1898); *Peck* v. *Jenness,* 48 U. S. (7 How.) 612, 624-625 (1849).

4. The Eleventh Amendment furnishes no shield to injunctive relief, particularly where the right invaded and sought to be remedied is of a constitutional nature. This principle was settled in *Ex Parte Young, supra* and has been consistently reaffirmed ever since. *Griffin* v. *Sch. Bd. of Prince Edward Co., supra.* Cf. *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42 (E. D. La. 1960); aff'd 365 U. S. 569 (1961). Similarly, there is no jurisdictional impediment to compliance with the mandate of the court below. Jurisdiction is founded in 42 U. S. C. A. § 1983 and 28 U. S. C. A. § 1343(3), which relate to the due process and equal protection rights of persons as well as to the privileges and immunities of citizens. *NAACP* v. *Alabama,* 357 U. S. 449 (1958); 377 U. S. 288 (1964); *NAACP* v. *Button, supra.*

CONCLUSION

Wherefore, for the reasons herein above set forth, respondents respectfully request that the petition in the above-entitled cause be denied.

Respectfully submitted;

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